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to suppress victim's in-court identification of defendant; whether trial court improperly failed to suppress victim's identifications of defendant under article first, § 8, of state constitution on basis of Supreme Court's modification in State *v.* Harris *(330 Conn. 91) of reliability standard in* Biggers *with respect to admissibility of eyewitness identification testimony; whether trial court's application of* Biggers *factors was harmless; claim that unconscious transference—mistaken identity of face seen in one context as face seen in another context—was fatal to trial court's application of* Biggers*; whether evidence was sufficient to support defendant's conviction as against deceased victim; claim that jury could not have reasonably inferred that second victim knew that deceased victim had cash and cell phone in car prior to search of vehicle by defendant and accomplice, and that defendant, his accomplice or both had taken deceased victim's cash and cell phone; claim that defendant could have been convicted of robbery in first degree only as accessory; whether evidence was sufficient to prove that defendant acted as principal during robbery; whether trial court abused its discretion in denying motion to disqualify trial judge, who had presided at prior trial of defendant's accomplice, ruled on accomplice's motion to suppress and indicated admiration for victim who testified against accomplice and against defendant.*

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2. The trial court did not abuse its discretion by providing a consciousness of guilt jury instruction as to the defendant's act of changing his shirt after the incident; at trial, the defendant, in testifying on his own behalf, did not dispute that he returned to his apartment after the incident to change his shirt, and the evidence presented at trial reasonably could have permitted a jury to draw the inference that the defendant's act of changing his shirt was motivated by a desire to avoid detection by law enforcement because the shirt had blood or dirt on it from the altercation with the victim.

Argued May 20—officially released July 9, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree, from which the defendant appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Mario Chavez, appeals from the judgment of conviction, rendered following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). On appeal, the defendant claims that the court improperly (1) deprived him of his constitutional right to a fair trial by failing to instruct the jury, sua sponte, about the "inherent shortcomings" of simultaneous foreign language interpretation of trial testimony, and (2) instructed the jury that it could consider, as consciousness of guilt evidence, that the defendant changed his shirt shortly after the victim was stabbed. We disagree and, accordingly, affirm the judgment of conviction.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. On the morning of May 27, 2012, the defendant drove a number of friends home after a night of drinking in Bridgeport. Upon arriving in the neighborhood of one of the friends, an argument developed and a physical altercation ensued between two of the passengers in the defendant's vehicle. During the fight, a small group of onlookers, who had observed the altercation from a nearby home, approached the combatants in the street. Thereafter, some of the onlookers attempted to break up the fight, while the victim approached the defendant.

The victim confronted the defendant and forcibly removed a chain worn around the defendant's neck. In response, the defendant drew a knife and stabbed the victim once in the chest. Shortly after stabbing the victim, the defendant fled the scene. Surveillance footage taken from the defendant's apartment complex showed

the defendant returning to his apartment a short time later. Surveillance footage also showed the defendant leaving the complex not long after wearing a different color shirt.

The following day, the defendant learned of the victim's death and fled the country. The defendant ultimately was apprehended and extradited to the United States where he was charged with murder and manslaughter in the first degree in connection with the victim's death. In a substitute information, the state later charged the defendant with murder only.

The case was tried before a jury in October and November, 2017. The defendant testified in his own defense with the assistance of a Spanish-English interpreter. The defendant asserted that he stabbed the victim accidentally while trying to defend himself.

The defendant was found not guilty of murder but was found guilty of the lesser included offense of manslaughter in the first degree. The court sentenced the defendant to a total effective sentence of seventeen years of incarceration followed by three years of special parole. This appeal followed. Additional facts and procedural history will be provided as necessary.

The defendant first claims that the court improperly failed to instruct the jury, sua sponte, regarding the "inherent shortcomings" of translated testimony. Specifically, the defendant argues that because his testimony was translated from Spanish to English, it may have appeared less coherent or credible than a witness who testified in English. According to the defendant, the court's failure to provide an instruction on "the limitations of interpreted testimony" denied him of his constitutional right to a fair trial. We disagree.

As a preliminary matter, we note that the defendant raises this claim for the first time on appeal, requesting review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317

Conn. 773, 120 A.3d 1188 (2015).[1] He did not request that the court instruct the jury regarding the inherent limitations or flaws in translated foreign language testimony, nor did he comment on or object to a lengthy instruction given by the court on how the jury should evaluate translated foreign language testimony.

Despite the defendant's request for review pursuant to *Golding*, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). Our Supreme Court has held further that if a claim of instructional error has been waived under *Kitchens*, the defendant is not entitled to *Golding* review. See *State* v. *Bellamy*, 323 Conn. 400, 410, 147 A.3d 655 (2016).

In the present case, both counsel provided the court with proposed jury instructions, attended an in-chambers charging conference, and had a subsequent opportunity to comment on the court's proposed instructions on the record before they were given to the jury. Because the defendant was presented with a meaningful opportunity to review and comment on the court's instructions,[2] and having done so, failed to raise the

[1] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error . . . (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781.

[2] The defendant does not argue otherwise.

CONNECTICUT REPORTS

Vol. 332

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ROBERT J. MCKAY v. STUART L. LONGMAN ET AL.
(SC 20013)
(SC 20014)

Robinson, C. J., and Palmer, D'Auria,
Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552e [a] [1] and [2]), a transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer was made and if the debtor made the transfer with intent to hinder, delay or defraud any creditor of the debtor or without receiving a reasonably equivalent value in exchange for the transfer.

Pursuant further to CUFTA (§ 52-552f [a]), a transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer was made, the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at that time or became insolvent as a result of the transfer.

The plaintiff, who had obtained a judgment in New York against his former business partner, the defendant L, sought to enforce that judgment in

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, D'Auria, Mullins, Kahn and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

Connecticut through the imposition of constructive trusts on certain real property in Ridgefield and on the proceeds from the sale of real property in Greenwich, and by having the trial court apply the doctrine of reverse corporate veil piercing to eight defendant companies affiliated with L, namely, S Co., X Co., R Co., G Co., W Co. and three other companies collectively referred to as the S entities. After the plaintiff obtained the New York judgment, S Co., a real estate development business, whose only asset was the Ridgefield property, obtained a loan from the defendant bank, M Co., secured by a mortgage on the Ridgefield property. L, a member of S Co., executed the mortgage documents on behalf of S Co., and S Co. then transferred title to the property to L. L then obtained a loan, secured by a mortgage against the Ridgefield property, and transferred title to that property back to S Co. L and his family occupied a residence on the Ridgefield property but never executed a lease with S Co. or made any rental payments. Subsequently, L acquired title to the Greenwich property in his name but, shortly thereafter, quitclaimed title to that property to X Co., a company owned by L's wife and controlled by L, for no more than nominal consideration and without payment of a conveyance tax. X Co. sold that property to a bona fide purchaser, and L, through X Co., distributed portions of the sale proceeds to L's personal bank account and among the bank accounts of various entities with which L was associated. The plaintiff alleged that, pursuant to the provision ([Rev. to 2017] § 34-130) of the Connecticut Limited Liability Company Act governing the authority of members and managers of limited liability companies to execute legal instruments on behalf of such companies, L did not have the authority to bind S Co. to the mortgage agreement with M Co., and sought to have that mortgage declared void so that it would not be an encumbrance on the Ridgefield property for purposes of enforcing the New York judgment. The plaintiff also alleged that L, through his control of various entities, fraudulently transferred the Ridgefield property to S Co. and the Greenwich property to X Co., in violation of §§ 52-552e (a) (1) and (2) and 52-552f (a), in an attempt to avoid creditors such as the plaintiff. The plaintiff further claimed that the trial court should apply the doctrine of reverse corporate veil piercing, an equitable remedy by which a court imposes liability on a corporation for the acts of a corporate insider, allowing a creditor to reach the assets of the corporation, to the eight defendant companies, to the extent necessary to satisfy the New York judgment. The trial court concluded that the plaintiff lacked standing to challenge the mortgage between M Co. and S Co. and to have it declared void. The trial court also set aside as fraudulent L's transfer of the Ridgefield property to S Co. and the Greenwich property to X Co. The court imposed a constructive trust on the Ridgefield property in favor of the plaintiff, subjecting it to all applicable postjudgment remedies, and imposed a constructive trust on all moneys received from or other items of value acquired through the transfer of the Greenwich property, and awarded damages

to the plaintiff. The trial court finally determined that S Co., X Co., R Co. and G Co. were alter egos of L, and that their separate corporate existence was to be disregarded for purposes of satisfying L's debt to the plaintiff, enjoining those companies from disposing of any assets prior to the satisfaction of the plaintiff's New York judgment but that the S entities were not alter egos of L. From the trial court's judgment, L, S Co., X Co., R Co. and G Co. appealed, and the plaintiff filed a separate appeal. *Held*:

1. The trial court correctly determined that the plaintiff lacked standing to challenge the enforceability of M Co.'s mortgage to S Co.: the plaintiff, who was not a party to the mortgage, a third-party beneficiary of it, or either a member or manager of S Co., did not fall within the zone of interests that § 34-130 was intended to protect, and, when M Co. and S Co. entered into the mortgage agreement, the plaintiff had not yet recorded a lis pendens on the land records and, therefore, had no recorded title interest in the property; moreover, there was no merit to the plaintiff's claim that, because the text of § 34-130 is silent as to who may bring an action under that statute, it confers standing on creditors of parties that enter into contracts with or on behalf of a limited liability company, as the effect of such a rule would expose future lenders to any and all such claims by any creditors of any party that enters into a contract with a limited liability company, thereby contradicting the apparent intent of the legislature in enacting the Connecticut Limited Liability Company Act, which was to give maximum effect to the enforceability of limited liability company agreements.
2. The trial court's findings that L's transfers of the Ridgefield property to S Co. and the Greenwich property to X Co. were fraudulent under §§ 52-552e and 52-552f were not clearly erroneous: multiple factors set forth in § 52-552e (b) supported the trial court's finding with respect to the Ridgefield property, including that L was an insider with respect to S Co., as S Co. was owned directly and indirectly by L and his wife and L made all of the decisions for S Co., that, through this insider relationship, L used the Ridgefield property as security for multiple loans, some of which were obtained by L in an individual capacity and paid off by loans acquired in a representative capacity, that there was a recording delay with respect to L's transfer of the Ridgefield property back to S Co., which allowed L to obtain a second mortgage without ever holding the transfer proceeds in his name, that there was no more than nominal consideration for the transfer, and that there was no indication of any benefit to S Co. for allowing L, through this and related transfers, to extract equity from S Co.'s sole asset; moreover, with respect to the Greenwich property, this court determined that the property constituted L's asset for purposes of CUFTA, as the record supported the trial court's finding that L acquired that property with purchase money provided through a series of transfers originating from L's personal bank account, there was evidence that X Co., an entity owned solely by L's wife, paid

nothing more than nominal consideration for the property and that neither party paid a conveyance tax on the transfer, it appeared from the record that L's debts exceeded his identified assets, based on the amount of the New York judgment, which had increased significantly by the time of the transfer, and there was no apparent reason for the transfer to X Co., other than the avoidance of creditors such as the plaintiff.

3. This court recognized the doctrine of outsider reverse corporate veil piercing, and the trial court's application of the doctrine in the present case was not clearly erroneous:

a. This court, having recognized the doctrine of outsider reverse corporate veil piercing, set forth a three part test for its proper application, pursuant to which, first, the outsider must prove that, under the instrumentality or identity rule, as set forth in traditional veil piercing cases, the corporate entity has been so controlled and dominated that justice requires liability to be imposed or that there was such a unity of interest and ownership that the independence of the corporation had in effect ceased to exist, second, the trial court must consider the impact of reverse piercing on innocent shareholders and creditors, and, third, the trial court must consider whether adequate remedies at law are available.

b. The trial court's determination to apply the doctrine of reverse corporate veil piercing to S Co., X Co., R Co. and G Co. was not clearly erroneous: testimonial and documentary evidence admitted at trial demonstrated that L exercised control and dominance over S Co., X Co., R Co. and G Co. to perpetuate a fraud or wrong and that such wrong proximately caused the plaintiff's loss, as that evidence revealed, inter alia, that L fraudulently transferred the Ridgefield and Greenwich properties to S Co. and X Co., respectively, for the purpose of avoiding creditors, the property transfers rendered the plaintiff unable to attach L's assets in order to satisfy the debt owed to him, none of the four entities had any cognizable capital or sources of income other that from the transfers or from L's personal accounts, any inter-entity transactions made in conjunction with the transfers had no identified or identifiable business purpose and were subject to L's discretion, S Co. allowed L to maintain the family residence on its property without a lease, X Co. and R Co. were used to provide funds to L and his family members, there existed consistent ownership of the four entities by L's family members, L served as the decision maker for those entities, and most of the entities used the address of the Ridgefield property, where L and his family resided, as their business addresses; moreover, there was no impact to innocent investors or creditors, as none of the nonculpable creditors or equity holders would have been prejudiced by the application of reverse piercing, and there were no adequate remedies at law, as the constant movement of money and the multiplicity of entities left the court unable to calculate monetary damages.

c. The trial court's decision not to apply the doctrine of reverse corporate veil piercing to the S entities was not clearly erroneous, because, although the S entities received from X Co. proceeds from the sale of the Greenwich property, they were not alter egos of L, as they were engaged in a legitimate business, and the granting of such relief would affect nonculpable investors, who would be prejudiced if the plaintiff were permitted to attach assets in which they have an interest; moreover, the trial court correctly determined that the plaintiff had abandoned his claim of reverse piercing with respect to W Co.

(*One justice concurring separately*)

Argued November 15, 2018—officially released July 23, 2019

Procedural History

Action seeking, inter alia, to enforce a foreign judgment, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the case was withdrawn as to the defendant The Savings Bank of Danbury et al.; thereafter, Manufacturers and Traders Trust Company was substituted as a defendant; subsequently, the case was transferred to the Complex Litigation Docket and tried to the court, *Povodator*, *J.*; judgment for the defendant Manufacturers and Traders Trust Company et al., and judgment in part for the plaintiff as against the named defendant et al., from which the plaintiff and the named defendant et al. filed separate appeals with the Appellate Court; subsequently, the appeals were consolidated and transferred to this court. *Affirmed.*

James R. Fogarty, for the appellant in Docket No. SC 20013 and appellee in Docket No. SC 20014 (plaintiff).

Gary S. Klein, with whom was *Todd R. Michaelis*, for the appellees in Docket No. SC 20013 and appellants in Docket No. SC 20014 (named defendant et al.).

David K. Fiveson, pro hac vice, with whom was *Gerald L. Garlick*, for the appellee in Docket Nos. SC 20013 and SC 20014 (defendant Manufacturers and Traders Trust Company).

Opinion

KAHN, J. These consolidated appeals require us to consider three main issues: (1) whether a plaintiff who is neither a party to a mortgage nor an intended beneficiary thereof has standing to challenge the enforceability of that mortgage under the Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-130;[1] (2) whether specified transfers between an owner of property and the limited liability companies of which he is either an officer or equity holder constitute fraudulent transfers under the Connecticut Uniform Fraudulent Transfer Act (CUFTA), General Statutes §§ 52-552e (a) (1) and (2) and 52-552f; and (3) whether this court recognizes the doctrine of reverse piercing of the corporate veil and, if so, whether the trial court properly applied the doctrine to the facts in the present case. The plaintiff, Robert J. McKay, and the defendants Stuart L. Longman and various entities related to him—Sapphire Development, LLC (Sapphire); Lurie Investments, LLC (Lurie); R.I.P.P. Corp. (R.I.P.P.); 2 Great Pasture Road Associates, LLC (Great Pasture); W.W. Land Company, LLC (W.W. Land); Solaire Development, LLC; Solaire Management, LLC; and Solaire Funding, Inc. (collectively, corporate defendants)—filed separate appeals,[2] following a bench trial, from the trial court's judgment.

[1] All references herein to § 34-130 are to the 2017 revision. The legislature has since repealed the Connecticut Limited Liability Company Act, effective July 1, 2017, and replaced it with the Connecticut Uniform Limited Liability Company Act, General Statutes § 34-243 et seq.

[2] Longman and the corporate defendants, and the plaintiff, filed separate appeals from the judgment of the trial court to the Appellate Court, which consolidated the appeals, and we transferred the consolidated appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. The plaintiff named the following additional defendants in its substituted complaint, none of which is a party to this appeal: Emerald Investments, L.L.C.; 55 Post Road West Management Company, Inc.; Chatham Haste, LLC; Stuart L. Longman, Trustee of Stuart Longman Family Trust; 60 SRA Management, LLC; Shelter Rock Enterprises I, LLC; 60 Shelter Rock Associates, LLC; Shelter Rock Development Associates, LLC; Parcelle Develop-

The present case arises from the plaintiff's efforts to enforce a foreign judgment. The trial court found the following facts. In July, 1996, after a falling out between the plaintiff and Longman, who were once business partners, the plaintiff obtained a judgment in New York against Longman in the amount of $3,964,046.86 on the basis of the New York trial court's finding that Longman's actions constituted affirmative fraud against the plaintiff and that Longman's conduct was gross, wanton and wilful (New York judgment).[3] The plaintiff promptly filed a certified copy of the New York judgment in Connecticut. The plaintiff's efforts over the years to collect on the New York judgment have been unsuccessful, including his attempts to attach Longman's assets, which, over time, were in the form of two Connecticut properties: real property located in Ridgefield, which was the location of Longman's family residence (Ridgefield Property), and real property located in Greenwich (Greenwich Property).

Throughout the relevant time period, Longman transferred ownership of the Ridgefield and Greenwich Properties between himself and his various entities. Included among these land transfers are three contested transactions that "[set] the stage for . . . the predominant issues [on appeal]." Those three transactions, the additional details of which we set forth as necessary, occurred on the following dates and between the following parties. First, in October, 2007, Sapphire, a real estate development business owned partly by Longman that held record title to the Ridgefield Property during that time, obtained a loan from the defendant Man-

ment, LLC; Solaire Tenant, LLC; 31 Pecks Lane Associates, LLC; and Dreamfields, LLC. The Savings Bank of Danbury was also named as a defendant, but the action was later withdrawn against it.

[3] The record reveals that Longman secretly obtained a mortgage against his and the plaintiff's joint business and converted $625,000 of the proceeds to his own use. Longman then took steps to conceal the mortgage from the plaintiff, including renegotiating in bad faith the terms of a shareholder's agreement between them, resulting in further damages.

ufacturers and Traders Trust Company (M&T Bank)[4] secured by a mortgage against the Ridgefield Property. Second, in November, 2007, after Sapphire obtained the M&T mortgage and transferred title to the Ridgefield Property to Longman, Longman obtained a loan from J.P. Morgan Chase Bank, N.A. (Chase Bank), also secured by a mortgage against the Ridgefield Property (Chase Bank mortgage), and transferred title to that property back to Sapphire. Finally, in February, 2010, Longman individually acquired the Greenwich Property and transferred title of that property to Lurie, another real estate development business owned partly by him, allowing Lurie to sell the property to a bona fide purchaser several weeks later. Each of these contested transactions occurred and was recorded "prior to any filing of a lis pendens or judgment lien by the plaintiff . . . ."

After learning of these and other transactions entered into by either Longman or the entities he purportedly controlled, in October, 2010, the plaintiff filed an eight count complaint against Longman and twenty entities affiliated with him, M&T Bank, and The Savings Bank of Danbury. See footnote 2 of this opinion. The action by the plaintiff included, inter alia,[5] three main claims

[4] In April, 2016, the trial court granted the plaintiff's motion to substitute Manufacturers and Traders Trust Company, a wholly owned subsidiary of M&T Bank Corporation, in lieu of Hudson City Savings Bank (HCSB) as a defendant after a merger between the two entities. We refer to Manufacturers and Traders Trust Company as M&T Bank throughout this opinion for convenience. Consequently, although we observe that the trial court referred to the mortgage agreement entered into by HCSB and Sapphire as the HCSB mortgage, we will refer to it as the M&T mortgage.

[5] The first and second counts sought constructive trusts based upon common-law fraud as to the Ridgefield Property and the Greenwich Property, respectively. The third and fourth counts alleged fraudulent transfers of the Ridgefield Property under §§ 52-552e (a) (1) and (2) and 52-552f. The fifth and sixth counts alleged fraudulent transfers of the Greenwich Property under §§ 52-552e (a) (1) and (2) and 52-552f. The seventh and eighth counts requested that the trial court apply reverse veil piercing to the various corporate defendants based on the instrumentality rule and identity rule, respectively.

that are before us on appeal. First, the plaintiff alleged that various land transfers from Longman to entities he controlled—including his November, 2007 transfer of the Ridgefield Property to Sapphire and his February, 2010 transfer of the Greenwich Property to Lurie —violated §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA, and requested that the trial court impose constructive trusts on the Ridgefield Property and the proceeds from the sale of the Greenwich Property. Second, the plaintiff alleged that the M&T mortgage was unenforceable under § 34-130 and requested that the trial court declare it void in order to render the Ridgefield Property "unencumbered" by that mortgage when the plaintiff enforced the New York judgment against Longman and the corporate defendants. Third, the plaintiff alleged that the corporate defendants constituted alter egos of Longman and requested that the trial court apply reverse veil piercing to the corporate defendants "to the extent necessary to satisfy the [New York] judgment."

After an eight day bench trial, the trial court rendered judgment relevant to the issues on appeal in the following manner. The trial court rendered judgment as to counts one, three, and four in favor of M&T Bank, holding, inter alia, that the plaintiff lacked standing to challenge the M&T mortgage. The trial court rendered judgment as to counts three through eight in favor of the plaintiff as against Longman, Sapphire, Lurie, R.I.P.P., and Great Pasture. As against W.W. Land and Solaire Development, LLC, Solaire Management, LLC, and Solaire Funding, Inc. (Solaire entities), however, the trial court rendered judgment as to counts seven and eight in their favor. These consolidated appeals followed.

In order to place the parties' arguments on appeal in the proper context, we begin by outlining the trial court's decision. First, the trial court rendered judgment

in favor of the plaintiff as to counts three and four of his substituted complaint in the form of a declaratory judgment avoiding and setting aside the fraudulent transfer of the Ridgefield Property by Longman to Sapphire. Second, the court imposed a constructive trust on the Ridgefield Property, subjecting it to all postjudgment remedies that may be applicable. Third, the trial court rendered judgment in favor of the plaintiff as to counts five and six of his substituted complaint in the form of a declaratory judgment avoiding and setting aside the fraudulent transfer of the Greenwich Property by Longman to Lurie. Fourth, the trial court imposed a constructive trust on all moneys received from or other items of value acquired through the transfer of the Greenwich Property. Fifth, in addition to this constructive trust, the trial court entered an award of $250,000 in damages in favor of the plaintiff and against Lurie. Sixth, the trial court rendered judgment in favor of the plaintiff as to counts seven and eight of his substituted complaint in the form of a judgment declaring that Sapphire, Lurie, R.I.P.P., and Great Pasture are alter egos of Longman, and, as such, "their separate corporate existence shall be disregarded for purposes of satisfying the debt of . . . Longman to the plaintiff," and enjoined those defendants from disposing of any assets prior to the satisfaction of the plaintiff's foreign judgment. Seventh, the trial court rendered judgment in favor of M&T Bank as to all the claims asserted against it, including the plaintiff's claim under counts one, three, and four that a mortgage on the Ridgefield Property between M&T Bank and Sapphire (M&T mortgage) should be declared void. Eighth, the trial court rendered judgment in favor of the Solaire entities and W.W. Land as to all counts asserted against them.[6]

[6] In addition, the trial court rendered judgment in favor of the defendants Shelter Rock Enterprises I, LLC, 60 Shelter Rock Associates, LLC, and Shelter Rock Development Associates, LLC, which have not appealed, and the plaintiff either abandoned or withdrew his claims against the remaining entities. Additionally, the trial court rendered judgment in favor of Sapphire as to

The plaintiff appeals from the trial court's judgment in favor of M&T Bank as to its claim under counts one, three, and four that the M&T mortgage should be declared void. The plaintiff claims that the trial court incorrectly determined that he lacked standing to challenge the enforceability of that mortgage under § 34-130 (b), (c) and (d), because those subsections are silent as to who may bring a claim under them. M&T Bank responds that the trial court properly held that, as neither a party to nor an intended beneficiary of the mortgage between it and Sapphire, the plaintiff lacked standing to challenge it.[7]

M&T Bank's cross complaint against it. Finally, although the trial court imposed constructive trusts under the CUFTA counts, it rendered judgment in favor of all of the remaining defendants as to the plaintiff's first and second counts, which sought constructive trusts based on common-law fraud as to the Ridgefield Property and the Greenwich Property, respectively, noting that "a constructive trust is a permissible remedy under [some of the other] count[s]" and that it had "not found an independent 'fraud' as seemingly [was] alleged" in counts one and two.

Similarly, because, as the plaintiff conceded in his posttrial brief, the record established that W.W. Land had no assets at the time of the trial court's judgment, we reject the plaintiff's claim that the trial court intended to create a constructive trust to recover funds transferred from Lurie to W.W. Land after the sale of the Greenwich Property. With respect to Sapphire, R.I.P.P., and W.W. Land, the trial court noted that, "[*t*]*o the extent that any* or all *of these entities have any assets*, a constructive trust is an appropriate vehicle for attempting to recover part or all of their share of the proceeds of this sale." (Emphasis added.) On the basis of the fact that the trial court found that W.W. Land did not have any available assets at that time, we observe that it was not clear error for the trial court to refrain from rendering judgment against W.W. Land for the imposition of a constructive trust, as such a remedy was not available. This observation is supported by the fact that the trial court chose to create a constructive trust for Sapphire.

[7] M&T Bank appears to make additional claims in its brief that the trial court properly dismissed the plaintiff's claims against it under counts one, three, four, seven, and eight and also properly dismissed the plaintiff's claim that the M&T mortgage should be declared void. Because neither the plaintiff nor Longman and the corporate defendants brief these claims as against M&T Bank in their argument sections, as these claims do not respond to the issues framed by that bank or the other parties, we decline to address these issues. For similar reasons, and because we affirm the trial court's judgment that the plaintiff lacks standing to challenge the M&T mortgage,

Longman and the corporate defendants appeal from the trial court's judgment as to counts three through six whereby that court rendered two declaratory judgments avoiding and setting aside two specified transfers—one between Longman and Sapphire and the other between Longman and Lurie—under §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA, and imposed constructive trusts on the Ridgefield Property and the proceeds from or other items acquired through the sale of the Greenwich Property. Those defendants claim that, with respect to both transfers at issue, Longman did not transfer an "asset," which is required in order to find that a transfer is fraudulent under CUFTA. In response, the plaintiff claims that Longman and the corporate defendants misconstrue the facts and case law applicable to the question of whether the transfers were fraudulent and asks this court to uphold the trial court's determination.

Additionally, Longman and the corporate defendants appeal from the trial court's judgment as to counts seven and eight whereby that court rendered a judgment declaring that Sapphire, Lurie, R.I.P.P., and Great Pasture constitute alter egos of Longman and, as such, applied the doctrine of reverse piercing of the corporate veil to reach their assets to satisfy the plaintiff's foreign judgment. Those defendants claim that the reverse piercing doctrine conflicts with Connecticut law and that, in the alternative, the evidence in the present case does not support the application of reverse piercing. The plaintiff responds that this court should recognize reverse veil piercing as a viable remedy and conclude that the trial court properly applied the doctrine in the present case with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture.

we neither reach the defenses claimed by M&T Bank under the doctrine of laches nor the issue of whether it "would be entitled to a declaration that it is equitably subrogated to the September 24, 2007 satisfied [Washington Mutual] mortgage . . . ."

The plaintiff appeals separately, however, from the trial court's judgment as to counts seven and eight rendered in favor of the Solaire entities and W.W. Land with respect to that court's refusal to declare those entities alter egos of Longman. The plaintiff claims that the trial court's findings supported reverse piercing as to those entities. Longman and the corporate defendants respond that, if this court were to adopt reverse veil piercing, the trial court properly declined to apply it with respect to these four entities, because these entities are engaged in legitimate businesses and the application of reverse piercing would affect nonculpable parties who have an interest in those companies. We affirm the judgment of the trial court.

I

STANDING

Because the question of standing implicates subject matter jurisdiction, we first consider the plaintiff's claim that the trial court improperly held that he lacked standing to bring an action under § 34-130,[8] challenging

[8] General Statutes (Rev. to 2017) § 34-130 provides: "(a) Except as provided in subsection (b) of this section, every member is an agent of the limited liability company for the purpose of its business or affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.

"(b) If the articles of organization provide that management of the limited liability company is vested in a manager or managers: (1) No member, solely by reason of being a member, is an agent of the limited liability company; and (2) every manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including, but not limited to, the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a manager binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the manager has no such authority.

the sufficiency of Longman's authority, as a member of Sapphire, to bind the company to the mortgage agreement between it and M&T Bank. The plaintiff challenges the trial court's determination that he lacked standing to challenge the M&T mortgage, because, although he was a stranger to the transaction, he claims that the trial court did not analyze whether he lacked standing specifically under § 34-130, a statute that he claims was intended by the legislature to authorize third parties like him to bring claims. The threshold issue we must address, therefore, is whether the plaintiff is an individual who can challenge an alleged failure by Longman to comply with the requirements of § 34-130 when entering into a contract, when the plaintiff is neither a party to nor an intended beneficiary of that contract. We conclude that the trial court correctly determined that the plaintiff lacked standing to challenge the M&T mortgage.[9]

The record reveals the following additional facts that are relevant to our resolution of this claim. In October, 2007, Sapphire entered into a loan agreement with M&T Bank, secured by the $2.5 million M&T mortgage on the Ridgefield Property. Longman, acting as one of Sapphire's members,[10] executed the mortgage docu-

"(c) An act of a manager or member which is not apparently for the carrying on in the usual way the business or affairs of the limited liability company does not bind the limited liability company, unless authorized in accordance with the operating agreement, at the time of the transaction or at any other time.

"(d) An act of a manager or member in contravention of a restriction on authority shall not bind the limited liability company to persons having knowledge of the restriction."

[9] Because we conclude that the plaintiff lacks standing, we do not reach the plaintiff's substantive claim that, under the circumstances of this case, Longman lacked sufficient authority to enter into the M&T mortgage on behalf of Sapphire.

[10] When asked at trial whether he signed the mortgage as a member or the operating manager of Sapphire, Longman testified: I believe [I signed] it as an operating manager of Sapphire Development; but [the mortgage] does say member, so I'm a little confused."

ments. At the time he executed those documents, however, Longman owned only a 5 percent interest in Sapphire, with the remaining 95 percent interest owned almost exclusively by his wife, Gayla Longman (Gayla). Longman did not request Gayla's approval before executing the M&T mortgage.

Among its provisions, Sapphire's operating agreement vested in the operating manager the authority to manage the company, "[e]xcept for actions requiring the approval of the [m]embers pursuant to the provisions of the [Connecticut Limited Liability Company] Act, the [a]rticles [of organization], or this [operating] [a]greement . . . ." Under the same section, the operating agreement noted that the operating manager "shall not have the authority" to mortgage any property of Sapphire without the approval of a supermajority of Sapphire's members, which was defined as "[m]embers holding an aggregate of . . . 100 [percent] or more of the [p]ercentage [i]nterests held by all [m]embers."[11]

At trial, M&T Bank introduced into evidence Sapphire's 2008 statement of annual resolutions, which was signed by Gayla on January 27, 2008, a few months after Sapphire entered into the M&T mortgage, and contained a provision resolving "that all prior acts of the officers . . . including but not limited to entering into agreement[s] and executing documents prior to the adoption of said resolutions . . . are hereby ratified." Gayla testified at trial that, upon signing the document, she intended to ratify all the acts taken by Longman on behalf of Sapphire prior to January, 2008.

The plaintiff asked the trial court to declare the M&T mortgage unenforceable under § 34-130, because Sapphire's operating agreement did not authorize Longman, a 5 percent shareholder, to obtain a mortgage from M&T Bank without approval from Gayla, and because

[11] Longman testified at trial that these provisions were never amended.

M&T Bank had failed to confirm whether the mortgage to Sapphire had been approved according to the terms of that operating agreement. Although, ultimately, M&T Bank argued that Gayla ratified Longman's actions, it first claimed that the trial court lacked subject matter jurisdiction over the plaintiff's claim, because the plaintiff, who was neither a party to nor a third party beneficiary of the mortgage, lacked standing to challenge its enforceability.

The trial court determined that, "[a]bsent a viable claim that the mortgage transaction was a fraudulent transfer . . . the plaintiff [lacked standing] to challenge the sufficiency of the ratification process." The court reasoned that "the plaintiff . . . provided no authority that a third-party stranger to a transaction has the right to challenge the ratification of the transaction . . . when the actual parties have done everything possible to show consent and have engaged in substantial performance."

On appeal, we begin with the general principles governing standing to assert a claim. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions [that] may affect the rights of others are forged in hot controversy, with each view fairly and

vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement [however] exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 704–705, 960 A.2d 563 (2008).

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . [Stated differently, the] plaintiff must be within the zone of interests protected by the statute." (Citation omitted; internal quotation

marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 65, 946 A.2d 862 (2008).

The issue of whether an individual who was neither a party to nor an intended third-party beneficiary of a mortgage between a limited liability company and a bank falls within the zones of interests protected by § 34-130 so as to afford him standing to challenge whether a member of the limited liability company that executed the mortgage agreement as the company's agent possessed sufficient authority to bind the company through his actions presents a question of statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent).

On the basis of the plain language of this statute, only members and managers—who represent either their own interests as agents or those derivative of the limited liability company—and the parties with whom those members or managers contract fall within the zone of interests protected by § 34-130. We begin by noting that the statutory language found in § 34-130 (b), (c) and (d) governs the agency powers of members and managers to execute legal instruments in different contexts, including ordinary business transactions, extraordinary business transactions, transactions entered into under a member-managed limited liability company, and transactions entered into under a manager-managed limited liability company. A limited liability company may be "member-managed" or "manager-managed." See General Statutes (Rev. to 2017) § 34-140 (a) and (b). By default, the members of a limited liability company manage the company's affairs. The members, however, may, in the articles of organization, vest management of the business in a manager or managers. See General Statutes (Rev. to 2017) § 34-140 (a) and (b).

General Statutes (Rev. to 2017) § 34-130 (b), which addresses situations in which the limited liability company is manager-managed, provides in relevant part that a "manager . . . execut[ing] . . . any instrument, for apparently carrying on in the usual way the business or affairs of the . . . company . . . binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the . . . company in the particular matter *and* the person with whom he is dealing has knowledge of [that] fact . . . ." On its face, this subsection deals with protecting the interests of the party with whom the agent of a limited liability company contracts when that party is unaware that the agent lacks authority and seeks to enforce an agreement made between it and the agent. See 2 Restatement (Third), Agency § 6.01, comment (b), p. 4 (2006) ("[a]n agent has power to make contracts on behalf of the agent's principal when the agent acts with actual or apparent authority").

Section 34-130 (c), by contrast, addresses situations in which a member or manager acts as an agent and that member or manager "is not apparently . . . carrying on in the usual way the business or affairs of the . . . company," in which case his actions "[do] not bind the . . . company, unless authorized in accordance with the operating agreement . . . ." Subsection (c) appears to create a protection for the limited liability company itself, by restricting agents of the limited liability company from binding the limited liability company to extraordinary dealings, unless previously agreed on in the operating agreement.

Finally, § 34-130 (d), which also governs actions by the managers and members as agents of the limited liability company, provides that "[a]n act of a manager or member in contravention of a restriction on authority *shall not bind the limited liability company* to persons having knowledge of that restriction." (Emphasis

added.) Unlike subsections (b) and (c), which protect the contracting parties when the agent does not have actual authority to act on behalf of the limited liability company, § 34-130 (d) addresses situations in which the agent has apparent authority to act on behalf of the limited liability company. On the one hand, this subsection protects the unknowing party with whom the agent contracts, as it prevents the limited liability company from subsequently avoiding liability by alleging that the agent lacked authority to enter into the agreement. On the other hand, it also protects the limited liability company from being bound to transactions in which the party with whom the agent is contracting knows of a restriction on the agent's authority to enter into an agreement on behalf of its principal. See 3 Am. Jur. 2d 516, Agency § 74 (2013) ("[t]he doctrine . . . may not be invoked by one who knows or has good reason to know the limits and extent of an agent's authority").

We conclude that the plaintiff in the present case, who was neither a party to the M&T mortgage nor a third-party beneficiary of it, does not fall within the zone of interests that § 34-130 was meant to protect.[12] The plaintiff does not claim that he was either a member or manager of Sapphire; nor does he claim that he was a party to the mortgage agreement. Additionally, the plaintiff failed to establish that he was an intended third-party beneficiary of the mortgage. At the time Sap-

[12] Because we find that the plaintiff lacks standing under the plain language of § 34-130 (b), (c) and (d), we do not reach the plaintiff's argument that "the legislature . . . is presumed to have been aware of [General Statutes] §§ 33-649 and 33-1038 . . . [and its] omission [to limit the parties who may assert claims under § 34-130] must be construed as intentional." See *State* v. *Wright*, 320 Conn. 781, 801, 135 A.3d 1 (2016) ("[i]f the legislature's intent is clear from the statute's language, our inquiry ends . . . [and we do not] consider extratextual evidence of its meaning, such as . . . the circumstances surrounding its enactment . . . and the statute's relationship with existing legislation" [citation omitted]).

phire and M&T Bank entered into the mortgage agreement, the plaintiff had not yet recorded a lis pendens on the land records and, therefore, had no recorded title interest in the property.[13]

The plaintiff asks this court, however, to interpret the statute's silence as to who may bring an action under § 34-130 as an indication of the legislature's affirmative intent to allow persons other than members or managers of the limited liability company or the party with whom its agent contracts to bring a claim challenging the enforceability of an agreement between those two parties. That interpretation is inconsistent with the general contract principle, articulated by this court, that "one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract . . . ."[14] (Internal quotation marks omitted.) *Tomlinson* v. *Board of Education*, 226 Conn. 704, 718, 629 A.2d 333 (1993). We observe that other courts have applied this proposition in the context of mortgages. See, e.g., *In re Espanol*, 509 B.R. 422, 429

[13] To the extent that the plaintiff would benefit from a determination rendering the M&T mortgage void, as it would advance the priority of his security interest in the Ridgefield Property, we observe that an interest in the outcome does not equate to a beneficial interest in the mortgage itself. For similar reasons, we agree with the trial court that, in asking for a declaration that the M&T mortgage is void, "the plaintiff effectively seeks a windfall." The plaintiff argues, on the one hand, that Longman had such control and domination of Sapphire as to allow this court to uphold the trial court's determination that Sapphire was Longman's alter ego, while asking this court, on the other hand, to find that—with regard to the M&T mortgage—Longman did not have the authority to obtain a mortgage on Sapphire's behalf.

[14] Additionally, because the trial court did not find that any of the transfers surrounding the M&T mortgage constituted fraudulent transfers, we also reject the plaintiff's claim that the M&T mortgage is unenforceable because Sapphire was declared an "artifice" and "fraudulent transferee." As the trial court correctly noted, "absent a viable claim that the [M&T] mortgage transaction was a fraudulent transfer . . . the plaintiff [does not have] the right to challenge the sufficiency of the ratification process [of that mortgage]."

(Bankr. D. Conn. 2014) (citing *Tomlinson* and holding that "[o]nly a party to the contract or intended [third-party] beneficiary has standing to challenge or seek to enforce the terms of [a] mortgage"); *Crimmino* v. *Household Realty Corp.*, 104 Conn. App. 392, 393, 395–96, 933 A.2d 1226 (2007) (citing *Tomlinson* and holding that plaintiff lacked standing to request that judgment of strict foreclosure on residence in which he lived be set aside because he was not party to mortgage on which bank foreclosed and he had no recorded interest in subject property after transferring it to his children to "insulate the property from [his] creditors"), cert. denied, 285 Conn. 912, 943 A.2d 470 (2008).

Additionally, to the extent that the plaintiff claims that, because the statute is silent, it confers standing on creditors of parties that enter into contracts with or on behalf of a limited liability company, his claim lacks merit because such a reading of § 34-130 would expose future lenders to any and all claims by any creditors of any party that enters into a contract with or on behalf of a limited liability company. The effect of such a rule would contradict the apparent intent of the legislature in enacting the Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-100 et seq., which was to "give maximum effect to the principle of freedom of contract and to [the] enforceability of limited liability company agreements." General Statutes (Rev. to 2017) § 34-242 (a). Because we conclude that the trial court correctly determined that the plaintiff lacked standing to challenge the M&T mortgage, we do not reach the issue of whether the circumstances of this case would render the mortgage void or voidable.

II

FRAUDULENT TRANSFERS UNDER CUFTA

We next address whether the trial court incorrectly determined that, under §§ 52-552e and 52-552f, Long-

man fraudulently transferred title to the Ridgefield Property to Sapphire in December, 2007, and title to the Greenwich Property to Lurie in February, 2010. Longman and the corporate defendants claim that, with respect to both transactions, Longman did not transfer an "asset" under CUFTA. The plaintiff responds that Longman and the corporate defendants misconstrue the facts and case law applicable to his CUFTA claims. We conclude that the trial court's findings that these two transfers by Longman were fraudulent under §§ 52-552e[15] and 52-552f[16] were not clearly erroneous.

[15] General Statutes § 52-552e provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

"(b) In determining actual intent under subdivision (1) of subsection (a) . . . consideration may be given, among other factors to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

[16] General Statutes § 52-552f provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

We begin with the legal principles guiding our review of these claims. "A party alleging a fraudulent transfer or conveyance under the common law bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations or (2) that the conveyance was made with a fraudulent intent in which the grantee participated. . . . The party seeking to set aside a fraudulent conveyance need not satisfy both of these tests. . . . These are also elements of an action brought pursuant to §§ 52-552e (a) and 52-552f (a). Indeed, although the statute provides a broader range of remedies than the common law . . . [CUFTA] is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances] . . . .

"The determination of whether a fraudulent transfer took place is a question of fact and it is axiomatic that [t]he trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The elements of fraudulent conveyance, including whether the defendants acted with fraudulent intent, must be proven by clear, precise and unequivocal evidence." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 394–95, 957 A.2d 836 (2008). With these principles in mind, we turn to the plaintiff's claims.

"(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent."

A

We first address the contention by Longman and the corporate defendants that the trial court improperly held that Longman's December 4, 2007 transfer of the Ridgefield Property back to Sapphire for nominal consideration constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f. With respect to this transfer, Longman and the corporate defendants specifically claim that the transfers were intended only to satisfy Chase Bank's lending requirements, that Longman was merely "the facilitator for Sapphire that allowed Sapphire to effectuate [obtainment of the loan]," and, therefore, that Longman's temporary title to the property for this purpose did not render it his asset. The plaintiff responds that the timing of the transfers surrounding the Chase Bank mortgage indicates the fraudulent intent behind this transaction and that the timing of this particular transfer shielded the mortgage from the plaintiff. We conclude that the trial court's determination that the December 4, 2007 transfer was fraudulent is not clearly erroneous.

Because we agree with the trial court that reviewing the history of the transactions involving the Ridgefield Property is helpful in a context such as this one, in which "[t]he number of days that title to the property was in . . . Longman's name [since 1995] could be . . . measured in days out of a multiyear period of time," we observe that the following additional facts found in the record are relevant to our resolution of the plaintiff's fraudulent transfer claims with respect to the Ridgefield Property. In 1985, Longman purchased the Ridgefield Property, and, since 1987, he and his family lived in the residence located there. In 1995, while the New York action was pending against Longman, Longman executed a quitclaim deed conveying the Ridgefield Property to Gayla. Gayla provided no consideration for this transfer.

At approximately the same time as the New York judgment was rendered, the Ridgefield Property went into strict foreclosure, and a deficiency judgment was rendered in favor of Webster Bank, which entered into a settlement agreement in 1997 with Longman while the case was on appeal. Thereafter, the Ridgefield Property was transferred by Webster Bank in two portions: one portion to Longman's friend, David A. Thomas, and the second portion to R.I.P.P., a corporation created by Longman, of which Gayla was its sole shareholder and Longman its only director. Thomas transferred title to his portion of the property to R.I.P.P. in return for a mortgage. In 2001, Thomas filed an action to foreclose his mortgage from R.I.P.P., before assigning his interest in the mortgage to Highland Connecticut Investment, LLC (Highland), of which Longman had a 5 percent ownership stake and of which Emerald Investments, L.L.C. (Emerald) had a 95 percent ownership stake. At that time, The Stuart Longman Family Trust had a 90 percent ownership stake in Emerald, and Longman and Gayla each had a 5 percent ownership stake in Emerald. After this transfer, a judgment of strict foreclosure was rendered on behalf of Highland.

In January, 2002, Highland, acting through Longman, transferred title to the Ridgefield Property[17] to Longman individually. "[O]n the same day" that Longman executed the deed that transferred the Ridgefield Property from Highland to him, he individually executed an "open-end mortgage from . . . Washington Mutual Bank, FA . . . ." He recorded both the mortgage and the deed six days later. Longman admitted at trial that "the reason for the quitclaim deed . . . [was] obviously to effect this financing." The original principal amount of this mortgage was $1,920,000. On February 7, 2002,

[17] The record indicates that, at this time, the real property that was transferred was "a larger portion of what was resubdivided subsequently into the parcel that" we refer to as the Ridgefield Property.

Longman recorded a quitclaim deed conveying the Ridgefield Property back to Highland.

On July 27, 2007, Longman recorded a merger, executed on November 21, 2006, of Highland into Sapphire, then owned 95 percent by Emerald and 5 percent by Longman. Thereafter, on August 28, 2007,[18] Sapphire —the remaining entity postmerger—quitclaimed the Ridgefield Property to Longman, as trustee of The Stuart Longman Family Trust. This conveyance was made "in connection with" a second Washington Mutual mortgage on the Ridgefield Property that Longman executed as trustee of The Stuart Longman Family Trust.[19] The second mortgage, which was obtained on August 27, 2007,[20] in the amount of $2,800,000, was used in part to pay off the first Washington Mutual mortgage made to Longman individually.

On August 28, 2007, the day after he obtained the second Washington Mutual mortgage, Longman applied for the M&T mortgage loan.[21] On August 31, 2007, Long-

[18] The record is unclear as to when Sapphire quitclaimed the Ridgefield Property to Longman as trustee, because the deed entered into evidence at trial was dated August 8, 2005, but notarized on August 28, 2007, one day after Longman purportedly obtained the second Washington Mutual mortgage as trustee. At trial, Longman testified that he would guess it was executed in 2007.

[19] The record reflects that, when asked if he obtained permission from Gayla before signing the deed from Sapphire to Longman as trustee, Longman stated that he was authorized "by [him]self." When asked about his deposition testimony in which he stated that it was his practice to try to get authorization from Gayla and that he understood that to be reasonably competent management, Longman stated: "To the extent that they're family members, I would say that the rules are slightly different . . . . I don't believe that the same procedure holds true when you're talking about family members for whom I operate these various family businesses. But if you were talking about outside partners where it is truly an arm's-length situation, then, yes, you need to get their permission prior to signing documents on their behalf."

[20] The mortgage proceeds were disbursed on September 14, 2007.

[21] The borrower on the first page of the application is indicated as Longman.

man, as trustee for The Stuart Longman Family Trust, quitclaimed the property back to Sapphire. The M&T mortgage was closed on October 26, 2007, and the proceeds were disbursed to Sapphire on October 31, 2007. Certain proceeds from the M&T mortgage, in the amount of $2,294,596.24, were paid to Washington Mutual for the satisfaction of the second mortgage, given to The Stuart Longman Family Trust. There was a net balance of $199,921.55 remaining from the M&T mortgage proceeds, which was disbursed to Longman, and Longman testified that he does not know where that money went or how he spent it.

On the same dates that the M&T mortgage was closed and the proceeds were disbursed, Sapphire executed and recorded a quitclaim deed to the Ridgefield Property back to Longman, subject to the M&T mortgage, in order "to facilitate the closing of a financing with Chase Bank for [an additional] mortgage loan [secured by the Ridgefield Property] in the amount of . . . $500,000" to Longman individually. Longman executed the Chase Bank mortgage on November 20, 2007. Four days before the execution of that mortgage loan, however, Longman transferred his title to the Ridgefield Property to Sapphire for $1 "and other valuable consideration." The record indicates that no other consideration was provided.[22] Longman did not record the quitclaim deed for that transfer until December 4, 2007. Similarly, the Chase Bank mortgage was not recorded until December 26, 2007, which was more than one month after Longman executed the loan agreement and

[22] At trial, Longman testified that the additional consideration "would have been the attendant financing that paid off the prior debt"; however, the plaintiff impeached Longman with prior inconsistent testimony from his deposition, at which Longman testified that he had no reason to believe there was any other consideration paid. The record also indicated that no conveyance tax was received because there was no change in beneficial ownership.

twenty-two days after he quitclaimed the Ridgefield Property back to Sapphire.

With this background in mind, we turn to the governing law. As we have indicated, the plaintiff's claims of fraudulent transfer fall under §§ 52-552e and 52-552f of CUFTA. See footnotes 15 and 16 of this opinion. Consequently, the trial court considered the plaintiff's claims under each of these statutes and concluded that Longman's December 4, 2007 transfer of the Ridgefield Property back to Sapphire before recording the $500,000 Chase Bank mortgage that he obtained through a previous transfer of the property to him for that purpose "facially and substantively satisf[ies]" § 52-552e (a) (1) and (2), as "the prompt transfer back to Sapphire likely . . . was intended to shield the property from any creditors . . . ."

The trial court first considered the plaintiff's fraudulent transfer claims regarding the Ridgefield Property under § 52-552e (a) (1). With respect to finding "actual intent" as set forth in § 52-552e (a) (1), we have stated that, because fraudulent intent is "almost always . . . proven by circumstantial evidence," courts may consider numerous factors in determining whether a transfer was made with "actual intent" to defraud. *Canty* v. *Otto*, 304 Conn. 546, 564, 41 A.3d 280 (2012). In its memorandum of decision, the trial court relied on various factors set forth in § 52-552e (b) to support its finding of fraudulent intent: "Longman appears to have been an 'insider' with respect to Sapphire; he retained control of the property in a functional sense . . . there is a history of substantial delays in recording transactions; a multimillion dollar judgment had entered against [Longman] a decade earlier; at the time of the transfer back to Sapphire, the property was or appeared to be the overwhelming majority of assets (by value) then identifiable as owned by Longman; there was no consideration stated or paid for the transaction; [and]

he appears to have been rendered insolvent by the transfer, to the extent that the outstanding judgments appear to have exceeded all of his identified assets."[23] (Footnotes omitted.) In its analysis of § 52-552 (a) (2), the trial court noted both "the absence of any consideration for the transfer[s]" and the fact that the transfer of the Ridgefield Property back to Sapphire "rendered [Longman] insolvent," with "no indication as to an even theoretical ability . . . to pay debts" he then owed.

We conclude that these findings are not clearly erroneous. The record revealed, among other facts detailed by the trial court, that Longman was an insider, as Sapphire was owned directly and indirectly by him and Gayla, and he made all of the decisions for the company. See, e.g., *Zapolsky* v. *Sacks*, 191 Conn. 194, 200–201, 464 A.2d 30 (1983) (close relationship between defendants supported finding of fraudulent intent). The record revealed that, through this close relationship, various transfers enabled Longman to use the Ridgefield Property as security for multiple loans, some of which were obtained by Longman in an individual capacity and paid off by loans acquired in a representative role; a recording delay with respect to both Longman's transfer of the Ridgefield Property back to Sapphire and the Chase Bank mortgage allowed Longman to obtain that mortgage without ever holding the proceeds under his name; there was a lack of consideration; and there was no indication of any benefit to Sapphire for allowing Longman, through these transfers, to extract equity from its sole asset.

[23] The trial court noted, in part, the fact that "the only substantial assets that ever were identified by [Longman] as possibly indicative of his ability to pay debts was Florida property, which he conceded was tied up in litigation. There was no indication as to an even theoretical ability to liquidate those assets in order to pay debts, and an inability to pay debts as they become due necessarily implicates questions of ability to liquidate assets to pay such bills. . . . [In addition] there was at least one additional debt of [Longman] that was long overdue in being paid."

We also reject Longman's argument that the trial court incorrectly determined that Longman's transfer of the Ridgefield Property to Sapphire in October, 2007, constituted a fraudulent transfer because he was merely the facilitator of the loan for Sapphire. As we have explained, there is no evidence in the record that Sapphire, a purportedly independent real estate entity whose only asset was the Ridgefield Property, did or would benefit from Longman's obtaining an individual home equity loan secured by the property less than one month after Sapphire itself obtained the proceeds from the M&T mortgage.[24] We observe that, from the circumstances surrounding Longman's application for and recording of the Chase Bank mortgage, coupled with the history of multiple transfers, the trial court correctly found fraudulent intent. See, e.g., *National Council on Compensation Ins., Inc.* v. *Caro & Graifman, P.C.*, 259 F. Supp. 2d 172, 179 (D. Conn. 2003) (under Connecticut law, "[a]ctual fraudulent intent may be inferred from the circumstances surrounding the transaction").

The trial court next considered the plaintiff's fraudulent transfer claims under § 52-552f. See footnote 16 of

[24] Moreover, Longman and the corporate defendants' reliance on *Dentz Amusements, Inc.* v. *Aronson*, Docket No. CV-99-368009-S, 2002 WL 1335933 (Conn. Super. May 21, 2002), a case that is not binding on this court, is misplaced. In that case, the defendant, Yuly Aronson, and his wife took title to their newly purchased residence in their individual names in order to obtain a mortgage to finance it. Id., *1. The bank required that they apply for the mortgage as individuals, not as trustees of the trust in which they were going to hold title to the property. Id. Thereafter, the defendant and his wife executed a quitclaim deed to the trust. The trial court noted that "[t]here [was] no proof of intentional fraud, since the meeting of the technical requirements of the mortgagee does not rise to a suggestion of intentional fraud." Id., *2. In the present case, in addition to the series of transactions that preceded the transfers surrounding the Chase Bank mortgage, Longman did not give a reason for obtaining the Chase Bank mortgage and testified that he does not know where the net balance of $199,921.55 from the M&T mortgage proceeds, obtained less than one month before, went or how he spent it. In fact, Longman could not point to more than two home improvements on which he spent the M&T loan money.

this opinion. The trial court held that "the transactions whereby Sapphire transferred the property to [Longman], [Longman] then obtained a loan secured by the Ridgefield Property, and then transferred the property back to Sapphire subject to that mortgage, facially and substantively satisfy this statute." The court reasoned that "there was no consideration whatsoever for the transfer back to Sapphire, much less 'reasonably equivalent value' and [that] the existence of the multimillion dollar judgment [that had] essentially doubled by the time of this transaction . . . rendered . . . [Longman] insolvent . . . ." We conclude that the trial court's finding that the transfer at issue was fraudulent under § 52-552f was not clearly erroneous, as the record indicates that nothing more than nominal consideration was provided.

B

We next address the claim by Longman and the corporate defendants that the trial court improperly found that the February 12, 2010 transfer of the Greenwich Property to Lurie constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f of CUFTA. See footnotes 15 and 16 of this opinion. Longman and the corporate defendants argue that the trial court improperly found that Longman had provided the purchase money for the equity piece of the property, when the record indicates—through Longman's deposition testimony—that "Lurie and/or Emerald" provided it. They further argue, therefore, that, because Longman purportedly purchased the Greenwich Property with equity received from Lurie—thus, purchasing the property on Lurie's behalf—he never owned the "asset," and its transfer to Lurie did not constitute a fraudulent transfer under Connecticut law. The plaintiff responds that the trial court properly found that the equity to purchase the Greenwich Property came from Longman, as the sequence of transfers indicates that, although

the purchase money transferred through Lurie, it originated in Longman's personal bank account and was funneled through the other corporate defendants. We conclude that the trial court's determination was not clearly erroneous.

The record reveals the following additional facts that are relevant to our resolution of this claim. On February 9, 2010, Longman acquired the Greenwich Property for $1,049,000 from Thomas, the same friend who, at one time, acquired an interest in the Ridgefield Property. Longman financed the purchase with a $600,000 commercial mortgage loan and paid the equity remainder. The closing statement for this transaction lists the balance of funds paid by Longman as $515,000.

At trial, the plaintiff introduced records from Longman's personal bank account and the bank accounts of Solaire Funding, Inc., Lurie, and R.I.P.P. to chronicle the following series of transactions, which occurred during the days leading up to the purchase of the Greenwich Property. On February 3, 2010, Longman transferred $500,000 from his personal bank account to the bank account of Solaire Funding, Inc., a corporation whose operating agreement lists Lurie as its sole member and Longman as its sole director. Solaire Funding, Inc., received the transfer on February 5, 2010, and three days later, transferred $500,000 to Lurie's bank account. Lurie received this transfer on February 8, 2010, and, on the same day, Lurie transferred amounts that totaled $514,000 to R.I.P.P.'s bank account. R.I.P.P.'s bank account, in turn, shows receipt of the Lurie transfers on February 8, 2010, and a check drawn from its account on that same day in the amount of $515,000.

On February 9, 2010, Longman executed a commercial mortgage loan to finance the remaining $600,000 of the purchase price of the Greenwich Property, and

Thomas executed the deed to the property that same day. Three days later, on February 12, 2010, Longman quitclaimed the property to Lurie, which was 100 percent owned by Gayla, for the stated consideration of $10. Longman testified that there was no conveyance tax paid with respect to this transfer. On April 30, 2010, Lurie sold the Greenwich Property to a bona fide purchaser for $1,850,000. On May 3, 2010, Lurie distributed the portions of the sale's proceeds to Longman's personal bank account and among the bank accounts of Solaire Funding, Inc., the Solaire entities, Sapphire, R.I.P.P., and W.W. Land. Longman testified that he did not "have any specific knowledge" as to why he made these transfers on behalf of Lurie.

Longman was asked at trial: "Who actually paid the equity piece of [the Greenwich Property]?" Longman responded that he "[did not] recall the source of the funds at [that] point, although it appear[ed] that the funds were drawn from a . . . Vanguard account . . . [a]nd were deposited into the R.I.P.P. account that [he] controlled and used for these purposes and was then in some way transferred to the attorney that closed on the property." When asked, in a follow-up question, whether he remembered testifying in his deposition that the money came from "Lurie and/or Emerald," and whether "that [would] be true," Longman responded, "if that's what I said at the time . . . I'm not arguing."

The trial court determined that "the Lurie transaction . . . falls within the range of statutory and common-law fraudulent transactions," noting that "[t]he fact that the property was sold to the bona fide purchaser less than three months after the initial acquisition of the property by Longman, with the actual title of ownership by [him] of perhaps a week, fits the pattern of . . . avoiding ownership in the name of Longman except to the minimal extent necessary for purposes of obtaining financing." The trial court reasoned that the New York

judgment debt that Longman owed to the plaintiff had increased by approximately $1 million dollars by 2010, Lurie provided "no consideration" for the transfer of the title to the Greenwich Property, and Longman, through Lurie, distributed a significant amount of the proceeds from the sale to entities controlled by Longman and to Longman's personal bank account.

We conclude that the trial court's determination that the February 12, 2010 transfer from Longman to Lurie constituted a fraudulent transfer under §§ 52-552e (a) (1) and (2) and 52-552f was not clearly erroneous, as the record supports that determination. First, contrary to the claim by Longman and the corporate defendants that the Greenwich Property did not constitute an asset of Longman, the trial court did not clearly err in finding that Longman "acquir[ed] the property through payment of funds from [an] . . . account maintained by the Longmans, coupled with commercial financing." The record reveals, at the very least, that the purchase money was provided through a series of transfers originating from Longman's personal bank account. Specifically, the amount of the check drawn on R.I.P.P.'s account—which occurred on the same day that R.I.P.P. received a large sum of money compared to the normal contributions listed in that account—correlated with the $515,000 listed on the closing statement from the sale and occurred at the end of a series of transfers within a short time frame.

Second, because the record supports the trial court's finding that Longman purchased the Greenwich Property with money from his personal bank account, the fact that Lurie, an entity owned solely by Longman's wife, paid nothing more than nominal consideration and neither party paid a conveyance tax, further supports the trial court's conclusion that the transfer to Lurie was fraudulent. See, e.g., *In re Galaz*, 850 F.3d 800, 804–805 (5th Cir. 2017) (lack of " 'reasonably equiv-

alent' " consideration presented badge of fraud indicating actual intent); *In re Bifani*, 580 Fed. Appx. 740, 746 (11th Cir. 2014) (same); *Cadle Co.* v. *Newhouse*, 74 Fed. Appx. 152, 153 (2d Cir. 2003) (same). Additionally, based on the amount of the New York judgment alone, it appears from the record that Longman's debts exceeded his identified assets. Longman also controlled the proceeds from the sale of the Greenwich Property when he paid off his credit card balance, and distributed various amounts to other corporate defendants and his personal bank account. See *In re Kaiser*, 722 F.2d 1574, 1583 (2d Cir. 1983) ("[t]he shifting of assets by the debtor to a corporation wholly controlled by him is [a] badge of fraud"). Moreover, looming large over this transaction, as noted by the trial court, was the fact that, "[w]hile it certainly is understandable that [Longman] would have wanted to replenish . . . [the] account from which some of the purchase funds had been obtained," there was no apparent reason—other than the avoidance of creditors like the plaintiff—for why Longman would have first transferred the property to Lurie, sold it and distributed the proceeds from that entity.

III

REVERSE PIERCING OF THE CORPORATE VEIL

The final issue we address is whether this court recognizes the doctrine of reverse piercing of the corporate veil and, if so, whether the trial court properly applied the doctrine under the facts of the present case. The principle known as reverse veil piercing is an equitable remedy by which a court imposes liability on a corporation for the acts of a corporate insider. Courts have generally recognized two forms of reverse veil piercing: insider and outsider. 1 Fletcher Cyclopedia of the Law of Corporations (Rev. 2018) § 41.70. Insider reverse veil piercing is applicable to cases in which the plaintiff is

a corporate insider seeking to disregard the corporate form for his own benefit. See 18 Am. Jur. 2d 699–700, Corporations § 51 (2004). Outsider reverse veil piercing, otherwise known as "third-party reverse piercing" and the type of reverse piercing at issue in the present case, "extends the traditional [veil piercing] doctrine to permit a third-party creditor to pierce the corporate veil to satisfy the debts of an individual shareholder out of the corporation's assets." 1 Fletcher Cyclopedia of the Law of Corporations, supra, § 41.70.

A number of jurisdictions have recognized outsider reverse piercing claims. E.g., *In re Phillips*, 139 P.3d 639, 646 (Colo. 2006) (en banc) (recognizing outsider reverse piercing and citing to several jurisdictions noting same); *C.F. Trust, Inc.* v. *First Flight L.P.*, 266 Va. 3, 11, 580 S.E.2d 806 (2003) ("Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership").[25] Because outsider reverse piercing differs from traditional reverse piercing by allowing the creditor to reach the corporation's assets without regard to the origin of those assets, however, some courts have rejected the doctrine to protect nonculpable shareholders and creditors. See, e.g., *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513, 77 Cal.

[25] See *LFC Marketing Group, Inc.* v. *Loomis*, 116 Nev. 896, 904, 8 P.3d 841 (2000) (reverse piercing is appropriate only in "those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted"); *Olen* v. *Phelps*, 200 Wis. 2d 155, 163, 546 N.W.2d 176 (App. 1996) (outsider reverse piercing recognized); see also *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 387 (4th Cir. 2018) (predicting that Delaware would recognize reverse piercing and noting that it is "particularly appropriate when an LLC has a single member"); *United States* v. *Badger*, 818 F.3d 563, 571 (10th Cir. 2016) (predicting that Utah Supreme Court would recognize reverse piercing claim); *Zahra Spiritual Trust* v. *United States*, 910 F.2d 240, 244 (5th Cir. 1990) (presuming that Texas would recognize reverse piercing claim "upon a finding that the individual [debtor] and the corporation should be treated as alter egos").

Rptr. 3d 96 (2008) (outsider reverse piercing "can harm innocent shareholders and corporate creditors"); *Acree* v. *McMahan*, 276 Ga. 880, 881, 585 S.E.2d 873 (2003) ("[w]e reject reverse piercing, at least to the extent that it would allow an 'outsider,' such as a third-party creditor, to pierce the veil in order to reach a corporation's assets to satisfy claims against an individual corporate insider").

The plaintiff and Longman and the corporate defendants separately appeal from the trial court's determination to apply reverse veil piercing to four of the eight corporate defendants. Longman and the corporate defendants ask this court either to reject the doctrine of reverse piercing or, in the alternative, to hold that the trial court improperly applied it to Sapphire, Lurie, R.I.P.P., and Great Pasture. The plaintiff responds that this court should adopt reverse piercing and hold that the trial court's conclusion was improper only insofar as it declined to pierce all of the corporate defendants that are the subject of this appeal. For the reasons set forth in this part of the opinion, we conclude that Connecticut recognizes the doctrine of outsider reverse veil piercing and that the trial court's application of reverse piercing in the present case was not clearly erroneous.

A

We begin by addressing the question of whether this jurisdiction recognizes the doctrine of reverse veil piercing.[26] Longman and the corporate defendants claim

[26] We reject the plaintiff's claim that Longman and the corporate defendants did not preserve the issue of whether reverse veil piercing doctrine is a viable remedy in Connecticut. Our review of the posttrial briefs, submitted to the trial court before it rendered its decision, indicate that this issue was discussed by both Longman and the corporate defendants and the plaintiff. Moreover, the trial court inevitably addressed the parties' arguments in applying the doctrine to the four entities; therefore, our review of this claim would not create a trial by ambuscade. See, e.g., *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 265, 828 A.2d 64 (2003).

that this court should reject the doctrine because it serves no legitimate purpose and contravenes public policy. In response, the plaintiff claims that reverse veil piercing is a viable remedy in other jurisdictions and that it should be adopted in Connecticut, as the facts of this case justify adopting the doctrine. We conclude that Connecticut recognizes the doctrine of outsider reverse piercing of the corporate veil.[27]

Because reverse veil piercing constitutes an expansion of the traditional veil piercing doctrine, a brief history of traditional veil piercing provides an informa-

[27] On June 25, 2019—seven months after we heard oral argument in this appeal and almost nine years after the plaintiff commenced his action—the parties advised us that, on that same day, the legislature had passed No. 19-181 of the 2019 Public Acts (P.A. 19-181), which codifies the instrumentality test for veil piercing and prohibits reverse veil piercing. Specifically, § 3 of P.A. 19-181 provides: "(*Effective from passage and applicable to any civil action filed on or after the effective date of this section*) No domestic entity shall be responsible for a debt, obligation or other liability of an interest holder of such entity based upon a reverse veil piercing doctrine, claim or remedy." (Emphasis in original.) Following passage of P.A. 19-181, this court ordered the parties to file supplemental briefs regarding the import, if any, of that prospective legislation to the present appeal. A review of the legislative history of P.A. 19-181 reveals that it was first referred to the Joint Standing Committee on Judiciary in March, 2019. There was no floor debate directly addressing or even indirectly relating to § 3 of P.A. 19-181, the provision relating to reverse veil piercing. Although we recognize that the legislature arguably expressed an intent in P.A. 19-181 to prevent the courts from applying the doctrine of reverse veil piercing, it is significant that the legislature explicitly stated that it intended § 3 of P.A. 19-181 to apply prospectively, that is, on or after July 9, 2019, the date the governor signed the legislation. See *D'Eramo* v. *Smith*, 273 Conn. 610, 620, 872 A.2d 408 (2005) ("we have uniformly interpreted [General Statutes] § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only" [internal quotation marks omitted]); *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 43, 61 A.2d 89 (1948) (effective on passage means date of governor's signature). Because of the act's prospective nature and the unfairness that would transpire by " 'impos[ing] a substantive amendment that changes the grounds upon which [the plaintiff may maintain this] action' "; id., 621; which was commenced nearly nine years ago to collect on a foreign judgment rendered against Longman in 1996, we conclude that P.A. 19-181 does not affect our decision to uphold the trial court's application of reverse veil piercing.

tive backdrop. Connecticut first recognized traditional veil piercing claims, by which a court may disregard a corporate fiction to hold individual stockholders liable, in *Zaist* v. *Olson*, 154 Conn. 563, 227 A.2d 552 (1967). In *Zaist*, this court held that courts may pierce the corporate veil under one of two theories: either the instrumentality rule or the identity rule. Id., 575. "The veil may be pierced if the elements of either theory are satisfied." *Avant Capital Partners, LLC* v. *Strathmore Development Co. Michigan, LLC*, Docket No. 312-CV-1194 (VLB), 2015 WL 136391, *6 (D. Conn. January 9, 2015). Since *Zaist*, this court has noted that "[t]he concept of piercing the corporate veil is equitable in nature," and "[n]o hard and fast rule . . . [exists to determine] the conditions under which the entity may be disregarded . . . as they vary according to the circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 555–56, 447 A.2d 406 (1982). Consequently, this court has not applied traditional veil piercing lightly but, rather, has pierced the veil "only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Internal quotation marks omitted.) Id., 557; see also, e.g., *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 234, 990 A.2d 326 (2010) ("courts decline to pierce the veil of even the closest corporations in the absence of proof that failure to do so will perpetrate a fraud or other injustice").

This court has addressed reverse veil piercing only once, in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 37 A.3d 724 (2012) (*State Five*).[28] Although this court deter-

[28] We observe that, although this court took up this issue in *State Five*, our Appellate Court applied reverse veil piercing in *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn.

mined that the facts of that case did not warrant reverse

911, 806 A.2d 49 (2002), in which that court concluded, as a matter of first impression, that reverse piercing is a viable remedy in this state. Id., 151. Although we denied certification in *Howell*, we observe that the facts of that case were similar to those in the present case. In *Howell*, the Appellate Court held that the evidence that the defendant Mary Ann Howell created two limited liability companies for the purpose of evading the debts she owed to the plaintiff, Litchfield Asset Management Corporation (Litchfield), was sufficient to reverse pierce the corporate veil of the two companies. Id., 152–58. In that case, the defendant owned and operated an interior design corporation, Mary Ann Howell Interiors, Inc. (Interiors). The defendant entered into an agreement with Litchfield in which she agreed to "perform services." Id., 135. When a dispute arose from that agreement, Litchfield brought an action against the defendant and Interiors in Texas and obtained a judgment against them in the amount of $657,207, plus interest, which was enforced by a Connecticut trial court and upheld by the Appellate Court in 1997. Id., 135.

While these actions were pending, the defendant and her husband, Jon Howell, formed two limited liability companies, Howell Interiors and Architectural Design, LLC (Design) and Antiquities Associates, LLC (Antiquities). Id., 135–36. Design and Antiquities were owned by the Howell family in the following manner: the defendant owned a 97 percent interest in Design, after borrowing against her life insurance policies to contribute $144,679 in exchange for ownership; Jon Howell and their two daughters, Wendi Howell and Marla Howell, each owned 1 percent of the shares after each contributed $10. Design, in turn, owned 99 percent of Antiquities, after it contributed $102,901 in exchange for its interest, and the defendant owned the remaining 1 percent of the shares after contributing $10. Id., 136.

After it was unable to reach the assets owed to it by Interiors and the defendant, Litchfield brought an action against the defendant, Jon Howell, Design and Antiquities, alleging that Design and Antiquities were shell companies created in a conspired effort "to fraudulently divert . . . assets beyond [Litchfield's] reach as a judgment creditor . . . ." Id. In upholding the trial court's application of reverse piercing to those companies and recognizing reverse piercing for the first time, the Appellate Court noted that the defendant "[was] the general manager of both Design and Antiquities. Neither company ha[d] any employees . . . [and] [b]oth companies operate[d] out of a loft space above the garage at . . . [the] [Howells'] personal residence. Neither company [paid] any rent . . . . [The defendant] exercised complete control over the policies, finances, and business practices of Design and Antiquities; there is no indication in the record that Jon Howell, Wendi Howell or Marla Howell participated in their operation in any significant way. [The defendant] has never drawn a salary or received regular distributions from either Design or Antiquities, but consistently has used company funds to pay for many personal expenses and to provide . . . free loans or gifts to family members. . . . [P]ayments for Antiquities'

veil piercing[29] and, therefore, did not reach the issue, it observed that reverse veil piercing depends on the facts of the case and recognized equitable concerns regarding adoption of the doctrine but declined to foreclose its adoption in the future when presented with the "appropriate case." Id., 138 n.13. The appropriate case, this court explained, would be one in which the doctrine could be recognized under circumstances in which "it achieves its equitable purpose without harming third parties."[30] Id. This court went on to note that, if it were to adopt reverse piercing, it would limit its application. See id., 140 ("[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because

sales were deposited in Design's account without a corresponding reimbursement . . . [and] tax returns were not filed for either company for the two years preceding trial." Id., 137–38.

[29] In *State Five*, the Commissioner of Environmental Protection brought an action against State Five Industrial Park, Inc., and Jean L. Farricielli to recover the payment of civil penalties from a judgment in a prior action brought against Jean's husband, Joseph J. Farricielli, which he failed to pay. The commissioner alleged that Jean and State Five, a company in which only Jean and two sons of Jean and John had ownership interest, should be held liable—through, inter alia, reverse veil piercing—for the remainder of the earlier judgment against Joseph, because Joseph purportedly had attempted to conceal his assets by, in part, quitclaiming real property he owned to State Five. *State Five*, supra, 304 Conn. 133–34. In concluding that the trial court's application of reverse veil piercing was clearly erroneous, this court noted, in part, that the trial court improperly applied reverse veil piercing because it failed to evaluate whether the sons' interests—who each were passive minority owners of State Five—would be negatively impacted. Id., 143. Additionally, this court noted that the trial court failed to adequately ensure that third-party creditors did not exist or, if they did, that they would not be prejudiced. Id., 145. Further, this court reasoned that the trial court's analysis failed to establish how Joseph's interactions with State Five proximately caused the commissioner's inability to obtain the debts owed under the 2001 judgment, as the predominant asset transfer at issue—in which Joseph transferred a parcel of land to State Five—occurred more than five years before the 2001 judgment. Id., 147–48.

[30] We observe that the trial court's tailored application of the doctrine in the present case, which addressed the concerns outlined in *State Five*, serves as good evidence that trial courts can apply outsider reverse veil piercing in a particularized manner to achieve an equitable purpose.

the two share the same equitable goals, others *wisely* have recognized important differences between them and have either *limited*, or disallowed entirely, reverse veil piercing" [emphasis added]).

The majority in *State Five* outlined, in dicta, three concerns that arise specifically from the application of reverse veil piercing and suggested methods of limiting application of the doctrine. Id., 140–42. First, this court noted the concern that reverse piercing allows creditors to bypass normal judgment collection procedures. Id., 140. Second, this court noted that reverse piercing can harm nonculpable shareholders and creditors. Id. Third, this court noted that, as an equitable remedy, reverse piercing should be imposed only when there is an absence of adequate remedies at law. Id., 141. In a sole concurrence,[31] Justice Zarella echoed these concerns,[32] noting that, in contrast to traditional veil piercing, in which "the corporation itself is not affected by the piercing," in reverse veil piercing "[t]he corporation itself is liable—and thus corporate assets are vulnerable—for the wrongdoing of an individual." Id., 155.

We begin by discussing the first and second concerns articulated by the majority in *State Five*, which we observe are interrelated. On the one hand, the majority

[31] Justice Zarella wrote separately because he believed "compelling considerations militate against allowing reverse veil piercing" and that he "would overrule *Howell* to the extent it holds that reverse veil piercing is a viable legal theory in this state." *State Five*, supra, 304 Conn. 153 (*Zarella*, *J.*, concurring).

[32] Justice Zarella listed an additional concern as well, which was that "reverse piercing injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital . . . [and] [c]orporate creditors are likely to insist on being compensated for the increased risk . . . which will reduce the effectiveness of the corporate form as a means of raising credit." (Internal quotation marks omitted.) *State Five*, supra, 304 Conn. 160 (*Zarella*, *J.*, concurring). By ensuring a limited application of reverse piercing and, consequently, the infrequency with which it will be applied, however, this court's test both anticipates and addresses this systemic concern.

noted that "reverse piercing bypasses normal judgment-collection procedures, whereby judgment creditors [of an individual judgment debtor] attach the judgment debtor's shares in the corporation and not the corporation's assets . . . prejudic[ing] [other] rightful creditors of the corporation, who relied on the entity's separate corporate existence when extending it credit . . . ." (Internal quotation marks omitted.) Id., 140.[33] On the other hand, the majority in *State Five* noted that, "if a corporation has other [nonculpable] shareholders, they [too] obviously will be prejudiced if the corporation's assets can be attached directly . . . [because, in] contrast [to] ordinary piercing cases, [in which] only the assets of the particular shareholder [or other insider] who is determined to be the corporation's alter ego are subject to the attachment," in reverse piercing cases, the creditor can reach all of the assets of the corporation, "allowing the outsider to attach assets in which [nonculpable shareholders] have an interest." (Citations omitted; internal quotation marks omitted.) Id., 140–41; see also id., 158 (*Zarella*, *J.*, concurring).

Quoting the Virginia Supreme Court's opinion in *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13, in which that court recognized reverse piercing, this court stated, "a court considering reverse veil piercing must weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors."[34] (Internal quotation marks omitted.) *State Five*,

[33] Justice Zarella likewise explained that, because, in reverse piercing situations, the creditor often must prove that the corporation is an alter ego, the creditor then may take assets from the corporation without regard to where they originated, "greatly expand[ing] the scope of assets that a judgment creditor would normally be able to reach under traditional causes of action." *State Five*, supra, 304 Conn. 157–58 (*Zarella*, *J.*, concurring).

[34] In fact, this court noted in *State Five* that the trial court's failure to analyze whether innocent creditors or shareholders would be harmed led, in part, to its determination that the facts of that case did not warrant reverse piercing. *State Five*, supra, 304 Conn. 145.

supra, 304 Conn. 142; see also id., 158 (*Zarella*, *J.*, concurring). Other jurisdictions that have applied outsider reverse piercing have adopted the same considerations. See, e.g., *In re Phillips*, supra, 139 P.3d 646 (recognizing outsider reverse piercing of corporate veil doctrine but placing limitations on circumstances that would permit application, noting that, "[w]hen innocent shareholders or creditors would be prejudiced by outside reverse piercing, an equitable result is not achieved").

With respect to the third concern, that reverse veil piercing should not be applied if adequate remedies at law are available, this court in *State Five* explained that, unlike "the case of a traditional veil pierce . . . [in which] the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law . . . when the judgment debtor is a shareholder or other insider, many legal remedies potentially are available to reach corporate assets that rightfully should be available for collection . . . ." (Citation omitted; internal quotation marks omitted.) *State Five*, supra, 304 Conn. 141. Therefore, this court indicated that, "because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law . . . including the attachment of the debtor's shares in the corporation . . . garnishment of . . . pay from the corporation . . . or . . . challenging . . . transfers of assets to the corporation as fraudulent conveyances or illegal conversion . . . ."[35] (Citations omitted.) Id.

[35] Referring to the concerns expressed in *State Five*, Longman and the corporate defendants argue against reverse piercing for the following reasons: (1) reverse piercing is not a viable remedy; (2) the trial court did not properly apply the three considerations set forth in *State Five*; and (3) Connecticut statutes both "[specify] the means by which a judgment debt may be collected . . . and the procedures that must be followed to dissolve a business entity," and also provide "adequate remedies at law [through] Connecticut's statutory judgment debt collection scheme . . . ." In part, Longman and the corporate defendants claim that a charging order under General Statutes § 34-259b is the exclusive remedy available to the plaintiff. Other jurisdictions that have addressed this claim under charging order

Other jurisdictions that have adopted reverse veil piercing have articulated the same additional consideration. See, e.g., *In re Phillips*, supra, 139 P.3d 647 ("the availability of alternative, adequate remedies must be considered by the trial court"); *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 13 ("[t]he court must also consider the availability of other remedies the creditor may pursue").

Declining "to hold that this doctrine is not viable under any circumstance," the majority in *State Five* noted that it was "not convinced . . . that [these three] concerns cannot be addressed adequately, in the appropriate case . . . and [was] reluctant to presume that there is no possible factual scenario in which reverse veil piercing would be appropriate . . . ."[36] *State Five*,

statutes with similar language have held that "piercing the veil of an alter ego is not the type of remedy that the [exclusivity] provision was designed to prohibit." *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 388 (4th Cir. 2018); see also *State Five*, supra, 304 Conn. 159 n.5 (noting that charging order "only transfers to the judgment creditor a right to receive distributions") (*Zarella, J.*, concurring); *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 151 n.14 (noting that "[the defendant] did not receive regular distributions but rather, paid her personal bills directly using limited liability company funds").

[36] On the basis of this and other dicta in *State Five* and case law from other jurisdictions, we reject the additional arguments of Longman and the corporate defendants, including their claim that reverse piercing "is based on a false analogy," because the company itself "perpetrated no [wrongful] conduct," that corporations "are not protected . . . by any 'veil,' " and that the company is not the "real actor." Under this equitable remedy, whether the limited liability company itself "perpetrated" the wrongful conduct is irrelevant, because when the equity holder and the company are held to be alter egos, they are considered one and the same, and, therefore, the company can be held liable for the wrongdoing of its equity holder. See *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12 ("[t]he piercing of a veil is justified when the unity of interest and ownership is such that *the separate personalities* of the corporation and/or limited partnership and the individual *no longer exist, and adherence to that separateness would create an injustice*" [emphasis added]). This is especially true under the facts of the present case, in which the trial court properly found that there existed no nonculpable creditors or shareholders of Sapphire, Lurie, R.I.P.P., or Great Pasture. Cf. *State Five*, supra, 304 Conn. 142–43. Additionally, we reject Longman and the corporate defendants' claim that this question is properly

supra, 304 Conn. 138 n.13. Following our dicta in *State Five*, and on the basis of the facts in the present case, we recognize the viability of the doctrine of reverse veil piercing. We adopt the approach taken by the Virginia Supreme Court in *C.F. Trust, Inc.*, in which that court applied the traditional veil piercing rule but additionally required that "a court considering reverse veil piercing . . . weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors . . . [and] also consider the availability of other remedies the creditor may pursue." (Internal quotation marks omitted.) *State Five*, supra, 142, quoting *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13.

In summary, the following is the proper test to apply when an outsider seeks to reverse pierce the corporate veil. We reiterate that the inquiry is a three part process. In part one, the outsider must first prove that, under the instrumentality and/or identity rules, as set forth in traditional veil piercing cases, "the corporate entity has been so controlled and dominated that justice requires liability to be imposed . . . ." (Internal quotation marks omitted.) *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 147, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). If the outsider prevails on part one, then, in part two, trial courts must, consistent with our dicta in *State Five*, consider the impact of reverse piercing on innocent shareholders and creditors. In part three, also consistent with our dicta in *State Five*, trial courts must consider whether adequate remedies at law are available.

In part one of the test, which is similar to traditional veil piercing, trial courts must first apply the instrumen-

for the legislature. In *State Five*, this court recognized that reverse piercing the corporate veil, like traditional veil piercing, is an equitable remedy. Id., 141. For these and other reasons set forth in this opinion, we reject the remainder of the claims of Longman and the corporate defendants as meritless.

tality and/or identity rules and determine if the elements of either are satisfied. See *Avant Capital Partners, LLC* v. *Strathmore Development Co. Michigan, LLC*, supra, 2015 WL 136391, *6. The instrumentality rule involves an examination of the defendant's relationship to the company and requires the court to determine whether there exists proof of three elements: "(1) Control [by the defendant], not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; *and* (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Emphasis in original; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 553.

In assessing the first prong of the instrumentality rule, that is, whether an entity is dominated or controlled, courts consider a number of factors, including "(1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlapping ownership, officers, directors, personnel; (5) common office space, address, phones; (6) the amount of business discretion by the allegedly dominated corporation; (7) whether the corporations dealt with each other at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of debts of the dominated corporation; and (10) whether the corporation in question had property that was used by other

of the corporations as if it were its own." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 233.

With regard to the second and third prongs of the instrumentality test, that is, (2) whether such control was used to commit a fraud or wrong, and (3) whether that fraud or wrong proximately caused the plaintiff's loss, this court has stated that "[i]t is not enough . . . simply to show that a judgment remains unsatisfied . . . . There must be some wrong beyond the creditor's inability to collect, which is contrary to the creditor's rights, and that wrong must have *proximately caused* the inability to collect." (Citations omitted.) *State Five*, supra, 304 Conn. 150.

The identity rule, which this court has observed "complement[s] the instrumentality rule," has one prong, which requires the plaintiff to show "that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, [in which case] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Zaist* v. *Olsen*, supra, 154 Conn. 575, 576; see also *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 554.

If the trial court finds that either the instrumentality or identity rule is met, then it must consider the remaining two parts of the proposed test, i.e., the *State Five* considerations. Under part two, the court must "weigh the impact of such action upon innocent investors . . . [and] innocent secured and unsecured creditors," and, under part three, the court must "consider the availability of other remedies the creditor may pur-

sue." (Internal quotation marks omitted.) *State Five*, supra, 304 Conn. 142, quoting *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 12–13.

B

With this test in mind, we now review the trial court's application of reverse veil piercing to the facts of the present case. The same legal principles that govern traditional veil piercing govern reverse veil piercing. "Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact. . . . Accordingly, we defer to the trial court's decision to pierce the corporate veil, as well as any subsidiary factual findings, unless they are clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . .

"Generally, a corporation is a distinct legal entity and the stockholders are not personally liable for the acts and obligations of the corporation . . . or vice versa. Courts will, however, disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor. . . . In a traditional veil piercing case, a litigant requests that a court disregard the existence of a corporate entity so that the litigant can reach the assets of a corporate insider, usually a majority shareholder. In a reverse piercing action, however, the claimant seeks to reach the assets of a corporation or some other business entity . . . to satisfy claims or a judgment obtained against a corporate insider. . . . In either circumstance, veil piercing is not lightly imposed. [C]orporate veils exist for a reason and should be pierced only

reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities. . . . Accordingly, the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Citations omitted; internal quotation marks omitted.) *State Five*, supra, 304 Conn. 138–39.

The plaintiff claims that the trial court properly applied the doctrine in the present case with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture, as that court properly applied the instrumentality rule and considered the concerns this court raised in *State Five*, but asks this court to reverse the trial court's decision not to reverse pierce the Solaire entities and W.W. Land. To support the latter claim, the plaintiff argues, first, that the trial court intended to reverse pierce the veil of W.W. Land and that it confused the Solaire entities named here with a separate entity, Solaire Tenant, LLC (Solaire Tenant), and, second, that the facts of the present case justify reverse piercing as to those entities. Longman and the corporate defendants respond that, if we choose to recognize the doctrine of reverse piercing, this court should find that the trial court improperly applied the doctrine as to Sapphire, Lurie, R.I.P.P., and Great Pasture, because the plaintiff failed to present evidence of ownership by Longman, evidence of control and proximate causation, and evidence alleviating the *State Five* concerns. We conclude that the trial court did not clearly err either in its application of reverse veil piercing to Sapphire, Lurie, R.I.P.P., and Great Pasture or in its decision not to apply reverse piercing to the Solaire entities and W.W. Land.

In addition to the facts already set forth in parts I and II of this opinion, the record reveals the following

facts that are relevant to our resolution of these claims. Testimonial and documentary evidence admitted at trial—which included deeds, corporate documents, bank statements, tax documentation, and bankruptcy records—revealed the following, often interrelated, facts about the history of Sapphire, Lurie, R.I.P.P., and Great Pasture. Longman originally organized Sapphire to purchase and develop a property located at 2 Great Pasture Road in Danbury. As part of a reorganization pursuant to Chapter 11 of the United States Bankruptcy Code, however, Sapphire transferred title to that property in 2006 to a newly created entity, Great Pasture. Sapphire did not have any employees, and its sole asset from that point forward was the Ridgefield Property, which did not produce an income. While holding the Ridgefield Property, Sapphire conducted no business, and the Longman family continued to reside in the residence located there without ever executing a written lease with Sapphire.

After the transfer of 2 Great Pasture Road, Sapphire derived its income from the other related entities. On its 2007 M&T mortgage application, Longman listed Lurie and Great Pasture under "bank accounts" as assets of Sapphire. In 2007, Longman also filed, on behalf of Sapphire, a final tax return for the company, which he claimed he did not carefully review, if he reviewed it at all. According to Sapphire's bank statements and the monthly operating reports it filed during bankruptcy,[37] Lurie contributed most, if not all, of the income that Sapphire received from 2009 to 2012.[38]

[37] Three days before trial in this case, Sapphire filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, which stayed the state court action for approximately two and one-half years. The United States District Court for the District of Connecticut upheld the bankruptcy court's dismissal of Sapphire's Chapter 11 petition, reasoning that it was filed in bad faith. See *Sapphire Development, LLC* v. *McKay*, Docket Nos. 3:15-cv-1570 (MPS) and 3:15-cv-1097 (MPS) (D. Conn. February 1, 2016).

[38] Between October, 2010 and January, 2011, each deposit of funds into Sapphire's bank account came from Lurie. Likewise, from February, 2011

Although Sapphire did not itself generate any income, Longman continued to use its assets and equity for his personal use. In 2006 and 2007, Longman and Gayla took itemized deductions on their joint federal tax returns for taxes and mortgage interest associated with the Ridgefield Property. Additionally, Sapphire's 2006 federal tax return indicated that Emerald, which held a 95 percent interest in Sapphire according to Sapphire's operating agreement, was allocated 5 percent of the profits and losses of Sapphire, and Longman, who held a 5 percent interest, was allocated a 95 percent share of Sapphire's profit and losses. At trial, Longman testified that this tax return was never amended.

During the relevant time period, Gayla owned a majority interest in Sapphire, but Longman made decisions on behalf of the company. Prior to 2008, Gayla held a majority interest in Sapphire through her majority interest in Emerald. In 2008, Longman assigned his 5 percent interest and Emerald's 95 percent interest in Sapphire to Gayla for no consideration. Longman remained Sapphire's operating manager throughout the relevant time period, and Sapphire's operating agreement required a supermajority vote to remove him. The record revealed that, during the time periods before and after the 2008 assignment that gave Gayla 100 percent ownership interest in Sapphire, Longman made decisions on behalf of the company in his capacity as Sapphire's operating manager.

The history of Lurie, another real estate development company controlled by Longman, reveals that Lurie was also used to hold Longman's property and provide funds to the Longman family. As we have explained, in 2010, Lurie held title to the Greenwich Property, purchased

through July, 2012, almost all of the funds deposited into Sapphire's bank account came from Lurie. Longman also testified that, "for the years 2009, 2010, [and] 2011 . . . Sapphire received many contributions from Lurie."

by Longman, for two months, until Lurie sold it to a bona fide purchaser and distributed most of the proceeds of that sale to the other corporate defendants three days later. Longman testified that he did not believe that Lurie had filed tax returns for the five years preceding Longman's 2011 deposition. Longman also admitted that, over a period of "five [or] six years," he would "regularly" allocate, from Lurie, $250 per week to the children "while they were in school" and $500 per week to Gayla.

Like Sapphire and Lurie, R.I.P.P. was owned by Gayla, and it distributed funds from its account to the Longman family members.[39] At trial, Longman testified that R.I.P.P., which was owned 100 percent by Gayla, with Longman and Gayla as its only directors, was "[o]riginally . . . conceived to be a family owned company that would handle investments on behalf of the family." Longman testified, however, that R.I.P.P. "never actually did much. It was superseded [by other companies] shortly after being formed . . . ." Longman testified at trial that, as was the case with Lurie, Gayla and their children were able "to write personal checks" from their individualized R.I.P.P. accounts, in order to extract allowances from the company.

The fourth entity pierced by the trial court, Great Pasture, held real property located at the address from which it received its name, after Sapphire transferred that property to it during Sapphire's 2006 reorganization. Lurie was the company's sole equity member after 2007, and Longman and his son, Matthew Longman, were the managers of Great Pasture. Longman was also the signatory on the account for the company. Lurie and Great Pasture provided income to each other inter-

[39] To the extent that Gayla held a majority share in any of these entities, the record revealed that she either gave Longman full "authority to make decisions as to all the identified entities" or ratified his conduct after the fact.

changeably. On the M&T loan application, Longman listed among Sapphire's assets the bank account for Great Pasture. After Longman's sale of the Greenwich Property, Lurie distributed $2000 to Great Pasture. Like Sapphire, Lurie, and R.I.P.P., the business address for Great Pasture was the address of the Ridgefield Property.

Unlike the former four entities, to which the trial court applied reverse veil piercing, Solaire Development, Solaire Management, and Solaire Funding were commercial businesses that provided services on an ongoing basis. They developed "commercial solar projects [such as] large [ground and rooftop] solar farms," which, at the time of their inception, "were the largest commercial solar installations in New England . . . ." As described by Longman, "Solaire Development owns the projects. Solaire Tenant leases the projects from Solaire Development as part of a sale of tax credits that funded the development of these projects. Solaire Management manages the sale of the electricity from those projects." Longman testified that this structure was organized to allow an investor, in this circumstance, Bank of America, "to obtain [a particular] tax benefit . . . and . . . [also] to effect the investment of the equity . . . required to build these projects." Specifically, Longman testified that "Solaire Tenant . . . [sold] the investment tax credit . . . to . . . Bank of America . . . through a broker called Cityscape Capital. . . . Cityscape Capital, as the managing broker of that transaction, actually owns 99 percent of Solaire Tenant and leases the arrays from Solaire Development. That structure allows for Bank of America, as the purchaser of the credits, to . . . receive the tax credit."

At the time of trial, the Solaire entities employed approximately ten people, who handled the field, regulatory, administrative, human resources, payroll, and

accounting tasks associated with these solar projects. The Solaire entities also employed an individual to maintain the corporate books "on a regular basis." The Solaire entities also had outside investors and creditors, including Bank of America, which, Longman testified, was "the ultimate purchaser and beneficiary of the [investment] tax credit and the depreciation [on these projects], which they [obtained] via the ownership structure that was set up among these entities." Solaire Funding, one of these entities, also received a treasury grant from the federal government in 2009.

The last of the corporate defendants, W.W. Land, "was formed to purchase, subdivide, and build out . . . a fifty unit . . . subdivision in Palatka, Florida . . . ." At the time of trial, W.W. Land was "still owning and dealing with the Florida subdivision that was built out in . . . 2006 [or 2007]." Following Longman's deposition in 2011, the plaintiff requested a temporary injunction, enjoining W.W. Land from "distributing, transferring or voluntarily encumbering the proceeds of . . . any sale of real property owned by [it]," and the trial court granted his request. At trial, Longman testified that, at that time, "the lots [were] fully done [and] [m]any of them [were] sold." Nevertheless, none of the lots on which the plaintiff had placed liens had been sold in the intervening period.

1

Reverse Veil Piecing as to Sapphire, Lurie, R.I.P.P., and Great Pasture

In light of this evidentiary record, we address the claim of Longman and the corporate defendants that the trial court improperly applied reverse piercing to Sapphire, Lurie, R.I.P.P., and Great Pasture. In his post-trial brief, the plaintiff claimed, inter alia, that the trial court should reverse pierce these four entities because Longman's control over them—evidenced by their own-

ership structure and the movement of funds between them—rendered them artifices. Longman and the corporate defendants responded that reverse piercing the corporate veil is not viable law in Connecticut and, in the alternative, it would be improper for the trial court to apply the doctrine to the present case because the evidence did not support that these entities were alter egos and the *State Five* considerations precluded relief.

The trial court first examined the facts presented under the instrumentality rule. The trial court found that " 'the element of domination and control' " was present. The trial court reasoned that "Sapphire's only asset of note was the Ridgefield Property, but its questionable ability to pay taxes was a measure of the uncertainty of [the] adequacy of its capitalization, and all of the subject entities that the court has included had no cognizable capital or sources of income other than the inter-entity transfers (or funds from such private sources as the Vanguard account). Factors three through ten all point in the direction of piercing—pervasive payment of personal expenses of Longman family members (and payments to family members); consistent ownership by Longman family members (chiefly Gayla—or a family trust) with Longman as the actual decision maker by title and function; the Ridgefield Property (home) as the business address for most entities; no indicia of independent business decisions/discretion; while there was evidence of a paper trail for inter-entity transactions, the transactions had no identified or identifiable business purpose, i.e., all [were] subject to the never explained and often unexplainable " 'discretion' " of [Longman]; the entities were not profit centers much less independent profit centers, as the principal transaction of Lurie was isolated and took place only after a consideration free transfer from brief ownership by [Longman], whereas the others had no identified material profit generation in any relevant time

period; Sapphire was essentially a guarantor of the personal debt of [Longman] via the Chase [Bank] mortgage, and there was, at best, ambiguity as to whether the taxes on the property were being paid by Longman as opposed to the nominal owner (when taxes were paid); and Longman was able to tap the equity of Sapphire, and draw down assets of other entities without regard to business (or any able to be articulated) purpose."

Our review of the trial court decision reveals that the court made all the requisite findings to establish instrumentality, fraud, and proximate cause.[40] Specifically, regarding whether Longman used his control and dominance to perpetrate a fraud or wrong, the trial court found that the evidence revealed that Longman fraudulently transferred the Ridgefield Property and the Greenwich Property to Sapphire and Lurie, respectively, "for purposes of avoiding creditors." But cf. *State Five*, supra, 304 Conn. 148 (reverse piercing was denied when plaintiff could not prove proximate cause because debtor's transfer of large parcel of real property to State Five occurred "more than five years prior to the 2001 judgment that imposed the fines at issue"). Additionally, the trial court found that the lack of any "semblance of a separate existence" of Great Pasture and the fact that R.I.P.P.'s "only identified source of funds in the relevant time frame [came] from Lurie, and Lurie already has been identified as not truly an independent entity," rendered these entities as additional "vehicles created for financial 'hide the pea' exercises . . . ." With respect to whether the wrong perpetrated proximately caused the plaintiff's loss, the trial court found that these transfers rendered the plaintiff unable to attach Longman's assets.

[40] We observe that the trial court made the requisite findings consistent to warrant reverse piercing under the test established herein.

After applying the instrumentality rule, the trial court considered whether innocent equity holders[41] or creditors would be prejudiced by the piercing and whether adequate remedies at law were available to the plaintiff. Regarding the question of whether innocent equity holders or creditors would be prejudiced by the piercing, the trial court found that "there [was] no basis for concern about other creditors . . . [as] there [has] been no evidence of possible other creditors of . . . entities . . . subject to this analysis," with the exception of "Sapphire, [whose] creditors all appear to be secured creditors . . . and, in any event . . . the reverse piercing is in the nature of a 'backup' to the fraudulent transfer claim . . . ." The court also considered the existence of nonculpable equity holders, principally Gayla, and noted that she received ownership of the entities for "no consideration," gave "Longman full and effectively sole authority to make decisions as to all identified entities . . . [and] more than acquiesced in the conduct of [Longman as] she expressed no direct interest . . . [and gave] affirmative authorization . . . ."[42]

The trial court next turned to the consideration of whether adequate remedies at law were available. The court found, with regard to the transfers of the Ridgefield Property, that, although it "already . . . applied a statutory and common-law framework for fraudulent transfers to the Ridgefield Property as nominally owned by Sapphire . . . the 'hook' in this case [was] the brief

[41] We observe that the majority in *State Five* used the term "shareholders," because the defendant entity in that case, State Five Industrial Park, Inc., was a corporation. Because all of the corporate defendants in this case, except for R.I.P.P., are limited liability companies, we use the term "equity holder."

[42] In a separate part of its decision, the trial court also "reject[ed] the notion that [Longman's son, Matthew] . . . identified as a 5 percent owner, without any apparent 'basis' in that investment," would be unfairly affected by the application of reverse piercing.

period of time that the property actually was owned by [Longman] within the relevant time frame." Likewise, with regard to the transfers of the Greenwich Property, that court found that "the multiplicity of entities, the constant movement of money between entities and to the family members, and the need for a painstaking analysis of actual bank records to track such movement of money, makes the tracing of specific sums of money difficult, if not impossible, absent a fraudulent transfer without liquidation."

After our review of the trial court's application of the facts with respect to Sapphire, Lurie, R.I.P.P., and Great Pasture under our three part test for reverse piercing, we conclude that the trial court's determination to apply the doctrine of reverse piercing as to those entities was not clearly erroneous. First, we agree with the trial court's analysis under the instrumentality rule. The trial court's conclusion that none "of the subject entities . . . included [by that court] had [any] cognizable capital or sources of income other than the inter-entity transfers"[43] or contributions from Longman's personal Vanguard account is supported by the record, which reveals the following. Sapphire was originally organized "to purchase and develop 2 Great Pasture Road in Danbury . . . [and] it transferred title to that property [in 2006] to . . . Great Pasture . . . ." After the transfer, Sapphire's only asset was the Ridgefield Property, and Longman testified that he did not know of any income Sapphire derived from that property since 2006, and that, by 2007, Sapphire engaged in no management activities because "the market was completely dead."[44]

[43] The trial court does note that, although Lurie did sell the Greenwich Property, "th[at] principal transaction . . . was isolated and took place only after a consideration free transfer from brief ownership by Longman, whereas the others had no identified material profit generation in any relevant time period . . . ."

[44] On the basis of the evidence presented at trial regarding tax returns filed with respect to the Ridgefield Property—such as Sapphire's 2007 tax return and the Longmans' joint tax returns for 2006 and 2007—we agree

Lurie's only asset was the Greenwich Property, which was transferred via a warranty deed to a bona fide purchaser in April, 2010. After the sale, "Lurie dispersed more than [one] half of the proceeds almost immediately [to the other entities] and there [was] no indication that Lurie retain[ed] any appreciable funds . . . ." The record also revealed that Sapphire and Lurie stopped filing tax returns around 2006. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 138 (reverse piercing applied where companies at issue failed to file tax returns during years preceding trial). Finally, it appears from the record that the only asset ever held by R.I.P.P. was the Ridgefield Property, of which it held only a portion and only from August, 1997 through August, 2001.[45]

Additionally, the trial court's findings that the "inter-entity transactions . . . had no identified or identifiable business purpose . . . [and were] subject to the never explained and often unexplainable 'discretion' of [Longman]," that "the entities were not profit centers much less independent profit centers," and that there existed "pervasive payment of personal expenses of Longman family members" are also supported by the record, which revealed through bank statements and monthly operating reports that, during various time periods, Lurie contributed most, if not all, of the income received by the other entities, especially Sapphire and R.I.P.P. Further evidencing these contributions, Sapphire's M&T mortgage application listed Lurie and Great

with the trial court that, "there was at best ambiguity as to whether the taxes on the property were paid by . . . the nominal owner (when . . . paid) . . . ."

[45] As we explained in part II of this opinion, in 2001, Thomas, the owner of the other portion of the Ridgefield Property and a friend of Longman, instituted a foreclosure action and assigned his interest in the R.I.P.P. mortgage to Highland Connecticut Investment, LLC, another Longman entity, of which Emerald, yet another Longman entity, owned 95 percent and of which Longman owned 5 percent.

Pasture under "bank accounts." In addition, Great Pasture and Lurie transferred funds to each other without any stated purpose. As to personal expenses, the plaintiff revealed, through his impeachment of Longman, that Longman would "regularly allocate" corporate funds from Lurie to Gayla and their children for spending money, and that the "family members had separate R.I.P.P. based accounts with the ability to write personal checks . . . ."

Further, the trial court's findings that there existed "consistent ownership by Longman family members . . . with Longman as the actual decision maker by title and function . . . [and] the Ridgefield Property (home) as the business address for most entities" are likewise supported by the evidence. The record reveals that most of the businesses used the address of the Ridgefield Property, the location of the Longman family's home, as their business addresses. Additionally, Sapphire managed the Ridgefield Property as its sole business but had no employees and did not receive any rental payments from the Longman family, who lived in the residence. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 137 (reverse piercing applied where companies were located at debtor's personal residence, had no employees, and did not pay rent). The record further revealed that, from the time that Sapphire merged with one of Longman's former limited liability companies, Highland Connecticut Investment, LLC, in 2007, ownership of Sapphire transferred between Longman, Gayla, and Emerald.[46] At the time of M&T Bank's loan to Sapphire in exchange for a mortgage of the Ridgefield Property, Longman had a

[46] Although Emerald was removed as a party due to bankruptcy proceedings, Emerald constituted another entity that received most of its income from Lurie. Monthly bank statements showing the Emerald account held with Bank of America were introduced at trial and revealed that, from February, 2011 through July, 2012, substantially all of the deposits into this account came through transfers from other entities, most from Lurie.

5 percent ownership interest in Sapphire and the other 95 percent was owned by Emerald, 95 percent of which, in turn, was owned by Gayla and 5 percent of which was owned by Longman. In 2008, Longman transferred 100 percent of the shares in Sapphire to Gayla for no consideration,[47] and, in 2010, Gayla transferred her interest to a family trust of which Longman was the trustee. Similarly, Longman and Gayla were the only directors of R.I.P.P., and Gayla was the sole shareholder. Gayla owned 100 percent of the membership interest in Lurie, until that interest was assigned to the Gayla Longman Family Irrevocable Trust, of which Longman was the trustee. Lurie, in turn, owned Great Pasture, and Longman, as trustee, and his son, Matthew, were the managers of it. Finally, on basis of the mortgages Longman obtained in the name of Sapphire and the "repeated extractions of equity from the property . . . seemingly going to [Longman] personally," we also agree with the trial court that, as to the ninth factor, "Longman was able to tap the equity of Sapphire and draw down assets of other entities without regard to business . . . purpose."[48]

[47] In fact, the trial court found that Gayla made no decisions regarding any of the entities. Moreover, based on the terms of Sapphire's operating agreement, as long as Longman held any interest in Sapphire, he could not be removed as the operating manager, therefore effectively securing his position as decision maker.

[48] The record reveals that each time Longman obtained a mortgage on the Ridgefield Property, the only asset held by Sapphire, Longman personally benefited, whereas it remains unclear from the record whether Sapphire received any benefit. For example, although the principal amount of the first Washington Mutual mortgage, given to Longman individually, was $1,920,000, the closing statement indicates that a check was issued to Longman in the amount of $449,005.15. The second Washington Mutual mortgage, given to Longman as trustee of the family's then defective trust, was used in part to pay off the first Washington Mutual mortgage made to Longman individually. Because the timing between the second Washington Mutual mortgage and the M&T mortgage were so close in time, the second Washington Mutual mortgage, although its proceeds were dispersed on September 14, 2007, was paid off only one month later, on October 31, 2007, with proceeds from the M&T mortgage that was executed on that day. There was a net balance of $199,921.55 from the proceeds of the M&T mortgage,

Having concluded that it was not clearly erroneous for the trial court to find that Longman exercised control and dominance over Sapphire, Lurie, R.I.P.P., and Great Pasture under the second and third prongs of the instrumentality rule, we further conclude that it was not clearly erroneous for the trial court to find that Longman used that control and dominance to perpetrate a fraud or wrong and that such wrong proximately caused the plaintiff's loss. Cf. *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 558. The trial court found that the evidence revealed that Longman fraudulently transferred the Ridgefield Property and the Greenwich Property to Sapphire and Lurie, respectively, "for the purposes of avoiding creditors . . . ." Additionally, it was not clearly erroneous for the trial court to determine that Longman's transfers of property between his various entities made it nearly impossible for the plaintiff to attach Longman's assets in order to satisfy the debt owed to him.

Moving to the remaining two parts of the test, which address the three concerns of *State Five*, we conclude that the trial court's findings that there was no impact to either innocent investors or creditors and no adequate remedies at law were not clearly erroneous. The trial court considered the existence of nonculpable creditors and equity holders, including mortgagees of the Ridgefield Property, Gayla, and Matthew Longman, and found that none would be prejudiced by its application of reverse piercing as to the four entities. The record revealed that, after 2006, Matthew Longman had no membership interest in Great Pasture, and Gayla authorized or ratified the decisions made by Longman with respect to those entities, in which she held a major-

and Longman testified that he does not know where that money went or how he spent it. Finally, one month after the M&T mortgage was executed, Longman—through Sapphire—received financing from Chase Bank for a second mortgage loan in the amount of $500,000.

ity of the membership interests. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 137 (reverse piercing applied where no family members, other than debtor, participated in companies in any way, but received free loans and gifts from them). But see *State Five*, supra, 304 Conn. 142–43 (reverse piercing rejected where trial court *failed to analyze* whether debtor's sons, who had an interest in State Five, would be negatively affected if court applied reverse piercing as to that company). These findings are strengthened by the fact that the trial court declined to reverse pierce the Solaire entities—although it noted that "[t]he plaintiff . . . marshaled the evidence in favor of their treatment as additional sham entities"—as it determined that reverse piercing of those entities would have harmed "innocent and unrelated parties," because those entities were "actually . . . engaged in ongoing business activities . . . [regarding] solar power installations."

As to whether adequate remedies at law were available, it was not clearly erroneous for the trial court to conclude, under the facts of this case, that there was no adequate remedy. The trial court specifically found that "the brief period of time that the [Ridgefield] Property actually was owned by [Longman] within the relevant time frame" allowed for the reverse piercing of the corporate veil and holding the assets of Sapphire available for the debt of Longman. Further, it was not clearly erroneous for the trial court to find that, with regard to the Greenwich Property, "the multiplicity of entities [and] constant movement of money" made it nearly impossible to calculate a monetary damages award under a fraudulent conveyance claim, which "generally is appropriate only where the transferee subsequently disposes of the transferred property and retains the proceeds of that disposition." *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 145.

2

Reverse Veil Piecing as to the Solaire Entities and W.W. Land

We next turn to the plaintiff's claim that the trial court improperly declined to apply reverse piercing to the Solaire entities.[49] The plaintiff claims that the Solaire entities are alter egos through Longman's ownership and management of them, that no nonculpable shareholders or creditors exist, and that no adequate remedies at law are available to provide the plaintiff with relief. Longman and the corporate defendants first respond that the plaintiff failed to introduce evidence to support his assertion that the Solaire entities are alter egos of Longman, as those entities "are engaged in legitimate [solar power] business . . . ." We con-

[49] With respect to W.W. Land, the plaintiff claims that the trial court "apparently intended to [render] judgment" in his favor with respect to his reverse piercing claims "against W.W. Land," because that court stated that, "[t]o the extent that [Sapphire, R.I.P.P. and W.W. Land] have any assets, a constructive trust is an appropriate vehicle for attempting to recover part or all of their share of the proceeds of [the] sale [of the Greenwich Property]." Longman and the corporate defendants respond that the trial court correctly determined that the plaintiff abandoned this claim in his posttrial brief. The trial court noted that, in the discussion of W.W. Land in the plaintiff's posttrial brief, the plaintiff "essentially abandon[ed] the claim of reverse piercing as to [it] due to considerations such as . . . a likely futile stipulated prejudgment remedy in place . . . ." We conclude that the court's determination was not clearly erroneous. The record revealed that, in the subdivision owned by W.W. Land, all of the lots had been developed, and many of them were sold. Longman testified at trial that, because the Florida real estate market had slowed, however, none of the lots had been sold since 2011. Additionally, in his posttrial brief, after discussing the other entities that he explicitly urged the trial court to reverse pierce, the plaintiff requested a withdrawal of the reverse piercing claims as to a number of entities. Within this section of his brief, as noted by the trial court, the plaintiff stated that, "[a]ccording to Longman's testimony, none of the lots of vacant land in Florida held in his name, as described in the [s]tipulation, [has] been sold . . . . For these reasons W.W. Land remains liable to [the plaintiff], even though, as a practical matter, it is probably judgment proof as the Florida property appears to be unmarketable . . . ."

clude that the trial court's decision with respect to the Solaire entities was not clearly erroneous.

The principal reason that the trial court refused to reverse pierce the Solaire entities is that granting such relief would affect nonculpable investors, such as Cityscape Capital and Bank of America, which would be prejudiced by allowing the plaintiff " 'to attach assets in which they have an interest.' "[50] *State Five*, supra, 304 Conn. 141. The trial court did note that "[t]he Solaire entities present the most difficult situation," as "[t]he plaintiff . . . marshaled the evidence in favor of their treatment as additional sham entities." That court also noted, however, that it "heard testimony . . . that [those entities] are engaged in a legitimate business . . . and [t]he concern about impact on innocent parties and the collateral damage to an ongoing business, militate[s] against applying the doctrine to [them]." We conclude that the trial court did not clearly err, as we observe that, although the record revealed that the Solaire entities received transfers from Lurie containing proceeds of the sale of the Greenwich Property, applying reverse piercing to these entities would implicate the concerns raised in *State Five*.

For the reasons set forth in this opinion, we conclude that the plaintiff, a stranger to the M&T mortgage, lacked standing to challenge the enforceability of that mortgage under § 34-130, the trial court properly held that Longman's transfers of the Ridgefield and Greenwich Properties in December, 2007, and February, 2010, respectively, constituted fraudulent transfers under

[50] Consequently, we reject the plaintiff's argument that the trial court misapplied the factors of Solaire Tenant to the Solaire entities. The record reveals that the structure of these entities is intertwined. For example, the record indicated that Solaire Tenant, which is owned by Cityscape Capital, leases the arrays from Solaire Development. Further, the plaintiff failed to provide evidence that the trial court's conclusion that the innocent investors would be affected was clearly erroneous.

CUFTA, the doctrine of outsider reverse piercing of the corporate veil is a viable remedy in Connecticut, and the trial court properly applied it to the facts of this case.

The judgment is affirmed.

In this opinion the other justices concurred.

ROBINSON, C. J., concurring. I write separately to highlight my understanding of part III A of the majority's comprehensive and well reasoned opinion, which I understand to adopt, in a very limited manner, the doctrine of outside reverse piercing of the corporate veil as a matter of Connecticut law for cases filed before July 9, 2019. See footnote 5 of this concurring opinion. The concerns about reverse piercing stated in Justice Zarella's concurring opinion in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 151, 37 A.3d 724 (2012), originally left me reluctant to join the majority's decision. The majority's narrow approach to reverse piercing, as shown by the distinctions drawn in part III B of its opinion, is, however, responsive to those concerns while preserving that doctrine as an equitable remedy when an individual abuses the "legal fiction" of the corporate form as a "sham or device to accomplish some ulterior purposes"; *Hoffman Wall Paper Co.* v. *Hartford*, 114 Conn. 531, 534–35, 159 A. 346 (1932); such as when a corporate entity does not serve "a legitimate business purpose," and is only "a mere shell . . . used primarily as an intermediary to perpetrate fraud or promote injustice." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 236, 990 A.2d 326 (2010). Accordingly, I join the majority opinion in its entirety.

By way of background, I observe that, in "traditional veil piercing, the veil shields a shareholder who is abusing the corporate fiction to perpetuate a wrong. In out-

side reverse piercing, however, the corporate form protects the corporation which, through the acts of a dominant shareholder or other corporate insider, uses the legal fiction to perpetuate a fraud or defeat a rightful claim of an outsider. While traditional [piercing] and outside reverse piercing affect diverse corporate interests, the purposes sought to be achieved are similar.

"Both types of piercing strive to achieve an equitable result. . . . In traditional piercing, equity requires [that] the veil be pierced to impose liability on a shareholder who has abused the corporate form for his or her own advantage. . . . Similarly, in outside reverse piercing, an equitable result is achieved by ignoring the corporate fiction to attach liability to the corporation." (Citations omitted.) *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006); see also, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 231–33 (describing purpose of piercing corporate veil under Connecticut law).

As Justice Zarella's concurring opinion explained, the fundamental difference between the two doctrines goes beyond "whether an individual has abused the corporate form" because "[u]nder traditional veil piercing, when an individual is held liable for the actions of the corporation, the corporation itself is not affected by the piercing. In the case of reverse veil piercing, however, the opposite is true. The corporation itself is liable—and thus corporate assets are vulnerable—for the wrongdoing of an individual. In more concrete terms, reverse veil piercing allows courts to alter the legislatively created corporate form by allowing a creditor to reach otherwise protected corporate assets." *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 155–56.

In expressing his view that the doctrine of outside reverse piercing "should be disavowed" as a matter of

Connecticut law, which would require us to overrule the Appellate Court's decision in *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002),[1] Justice Zarella's concurrence identified three major "compelling considerations" that he believed to "militate against allowing reverse veil piercing . . . ." *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 153. Specifically, Justice Zarella rejected reverse veil piercing on the grounds that it (1) "bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets," (2) "allows a judgment creditor to reach the assets of a corporation to the detriment of other shareholders and existing creditors," and (3) "injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital." (Internal quotation marks omitted.) Id., 155–60. Given these concerns, Justice Zarella would "reject the doctrine of reverse veil piercing until the legislature signals otherwise." Id., 160. I join the majority in the present case because I believe these concerns have been both undermined by subsequent developments in the law, or mitigated by what I understand to be the narrow approach taken in the majority opinion.

Justice Zarella's first concern about reverse veil piercing, which was founded on the decision of the United States Court of Appeals for the Tenth Circuit in *Cascade Energy & Metals Corp.* v. *Banks*, 896 F.2d 1557, 1577 (10th Cir.), cert. denied sub nom. *Weston* v. *Banks*, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990), is that the doctrine "bypasses normal judgment-collection procedures, whereby judgment creditors attach the

[1] The majority comprehensively discusses *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, in footnote 28 of its opinion.

judgment debtor's shares in the corporation and not the corporation's assets." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 156. In *Cascade Energy & Metals Corp.*, the Tenth Circuit declined to apply reverse veil piercing as a matter of Utah law, stating that "traditional theories of conversion, fraudulent conveyance of assets, respondeat superior and agency law are adequate to deal with situations [in which] one seeks to recover from a corporation for the wrongful conduct committed by a controlling stockholder without the [need] to invent a new theory of liability." *Cascade Energy & Metals Corp.* v. *Banks*, supra, 1577; see also *Floyd* v. *Internal Revenue Service*, 151 F.3d 1295, 1299 (10th Cir. 1998) (following *Cascade Energy & Metals Corp.* and declining to apply reverse piercing as matter of Kansas law, given availability of constructive dividend theory to render benefit to shareholder reachable for tax purposes). As the majority points out, this premise of *Cascade Energy & Metals Corp.* simply is not present in this case, because the sheer number of transactions involved and the movement of money between the multiple corporate entities made it "nearly impossible" as a factual matter to calculate a damages award under a fraudulent conveyance theory, rendering reverse piercing appropriate, and other theories inadequate, in the case at hand.

Moreover, the Tenth Circuit's decision in *Cascade Energy & Metals Corp.* has been substantially undercut by that court's much more recent decision in *United States* v. *Badger*, 818 F.3d 563 (10th Cir. 2016), which also considers reverse piercing under Utah law and is closer to the facts of the present case. In *Badger*, an individual who had agreed to a consent judgment on securities fraud claims used various corporate entities, including a trust and a limited liability company, to hide his assets and avoid collection, and the Securities and

Exchange Commission sought to reverse pierce the corporate veil of those entities to hold them liable for the disgorgement portion of the judgment. Id., 565. In agreeing with the commission's arguments, the Tenth Circuit panel deemed itself not bound by the court's previous interpretation of Utah law in *Cascade Energy & Metals Corp.* because *Badger* was distinct both factually and legally. Id., 570–71. With respect to state law, the court first determined that subsequent Utah Supreme Court and intermediate appellate court decisions had "expressed sympathy for reverse piercing, saying that it 'follows logically from the basic premise of the alter ego rule and appears consistent with our case law,' " despite deeming the doctrine inapplicable on the facts of the state court case. Id., 570, quoting *Transamerica Cash Reserve, Inc.* v. *Dixie Power & Water, Inc.*, 789 P.2d 24, 26 (Utah 1990). The court also observed that *Cascade Energy & Metals Corp.* had noted "three features of the case before it that argued against reverse piercing, and these features do not appear to be significantly present" in *Badger*, including (1) "[t]he corporations sought to be held liable had innocent shareholders," (2) the "liability arose out of a voluntary and contractual relationship, which enabled the victims to protect themselves from loss through guarantees or security agreements," and (3) "an essential feature of all [veil piercing] was absent [as] the plaintiffs had not shown that recognition of the corporate form would sanction a fraud, promote injustice, or produce an inequitable result," stating that "the mere existence of [a corporation's] limited liability would not suffice." (Citations omitted; internal quotation marks omitted.) *United States* v. *Badger*, supra, 569. Accordingly, the Tenth Circuit remanded the case to the district court for further factual development, including consideration of whether "reverse piercing would be inappropriate on the facts of this case," insofar as whether

"corporate formalities were observed, that the third-party entities played no part in Badger's wrongdoing, and [whether] innocent shareholders would be impacted if the district court were to apply reverse piercing."[2] Id., 572.

[2] Subsequent developments have likewise undercut the decision of the California Court of Appeals in *Postal Instant Press, Inc.* v. *Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96 (2008), review denied, California Supreme Court, Docket No. S164823 (August 27, 2008), which has been relied upon for the proposition that California rejects the doctrine of reverse veil piercing. See, e.g., 1 J. Cox & T. Hazen, The Law of Corporations (3d Ed. 2010) § 7:18, p. 443 n.20; N. Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice," 85 St. John's L. Rev. 1147, 1148 n.12 (2011). In *Postal Instant Press, Inc.*, the California Court of Appeals heavily relied upon the Tenth Circuit's analysis in *Cascade Energy & Metals Corp.* v. *Banks*, supra, 896 F.2d 1576–77, and observed the following: "Outside reverse piercing can harm innocent shareholders and corporate creditors, and allow judgment creditors to bypass normal judgment collection procedures. Legal theories (such as agency or respondeat superior) and legal remedies (such as claims for conversion or fraudulent conveyance) adequately protect judgment creditors without the need to distort theories of corporate liability." *Postal Instant Press, Inc.* v. *Kaswa Corp.*, supra, 1513.

California courts have since revisited the reverse piercing issue, at least in part, in a more recent decision, *Curci Investments, LLC* v. *Baldwin*, 14 Cal. App. 5th 214, 221 Cal. Rptr. 3d 847 (2017), which suggests that the doctrine is appropriate under the limited circumstances embraced by the majority in the present case. In that case, the court distinguished *Postal Instant Press, Inc.*, describing it as "expressly limited" to corporations, rather than limited liability companies, and also distinguishable because the judgment debtor in the case before it held "a 99 percent interest in [the limited liability company]. His wife holds the remaining 1 percent interest, but she is also liable for the debt owed . . . . There simply is no 'innocent' member of [the limited liability company] that could be affected by reverse piercing here." Id., 222. The court also emphasized the relative lack of judgment collection options available in the context of a limited liability company, because "a creditor does not have the same options against a member of [a limited liability company] as it has against a shareholder of a corporation," given the need to obtain a charging order against distributions to the member—who remains in control of the entity—rather than "step straight into the shoes of the debtor." Id., 223. The court emphasized that it was "unconcerned about reverse veil piercing being used when legal remedies are available. Although legal remedies—e.g., conversion, fraudulent transfer—may be available in many cases, thereby precluding reverse veil piercing, it is precisely the rare situations in which they are not that reverse piercing should deliver justice. Plus, requiring a creditor wishing to

Justice Zarella's concurrence also expressed his concern that "reverse piercing injects uncertainty into the corporate structure in a way that could systemically alter the ability of corporations to obtain loans and investment capital" because the "prospect of losing out to an individual shareholder's creditors will unsettle the expectations of corporate creditors who understand their loans to be secured—expressly or otherwise—by corporate assets. Corporate creditors are likely to insist

invoke the doctrine to demonstrate the absence of a plain, speedy, and adequate remedy at law would protect against reverse piercing being used to bypass legal remedies." Id. In remanding the case for further factual findings, the court emphasized that the "case before us presents a situation where reverse veil piercing might well be appropriate. [The judgment creditor] has been attempting to collect on a judgment for nearly half a decade, frustrated by [the judgment debtor] nonresponsiveness and claimed lack of knowledge concerning his own personal assets and the web of business entities in which he has an interest. Although the formation of [the limited liability company] predates the underlying judgment, its purpose has always remained the same—to serve as a vehicle for holding and investing [the judgment debtor's] money." Id., 224. The court further noted the judgment debtor's "possession of near complete interest in [the limited liability company], and his roles as [chief executive officer] and managing member, [the judgment debtor] effectively has complete control over what [the limited liability company] does and does not do, including whether it makes any disbursements to its members . . . . Since the time judgment was entered in [the judgment creditor's] favor, [the judgment debtor] has used that power to extend the payback date on loans made to ultimately benefit his grandchildren (loans on which not a single cent has been repaid), and to cease making distributions to . . . himself and his wife, despite having made $178 million in such distributions in the six years leading up to the judgment." Id.

I find similarly unpersuasive the Georgia Supreme Court's decision in *Acree* v. *McMahan*, 276 Ga. 880, 882–83, 585 S.E.2d 873 (2003), upon which Justice Zarella also relied in his concurring opinion in *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160–61. Like *Postal Instant Press, Inc.*, the decision in *Acree* relied heavily on the Tenth Circuit's decision in *Cascade Energy & Metals Corp.*, which I believe has been undercut by the subsequent decision in *United States* v. *Badger*, supra, 818 F.3d 563, at least with respect to the narrow application employed by the majority in the present case. See also *Mathias* v. *Rosser*, Ohio Court of Appeals, Docket No. 01AP-768 (CRP), 2002 WL 1066937, *6 (May 30, 2002) (relying on *Cascade Energy & Metals Corp.* and summarily rejecting reverse piercing doctrine under Ohio law).

on being compensated for the increased risk of default posed by outside reverse-piercing claims, which will reduce the effectiveness of the corporate form as a means of raising credit." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160, citing *Floyd* v. *Internal Revenue Service*, supra, 151 F.3d 1299. I believe that this concern is overstated, particularly given the narrow version of the doctrine that I understand the majority to adopt, which, consistent with the decisions of the Colorado Supreme Court in *In re Phillips*, supra, 139 P.3d 647, and the Virginia Supreme Court in *C.F. Trust, Inc.* v. *First Flight, L.P.*, 266 Va. 3, 12–13, 580 S.E.2d 806 (2003), requires consideration of the impact of reverse piercing on innocent shareholders, investors, and creditors.[3] With recognition of outside reverse piercing representing the distinct majority view; see, e.g., 1 C. Jones, Fletcher Cyclopedia of the Law of Corporations (2018–2019 Cum. Supp.) § 41.70, pp. 32–34 and n.2; there has been no "exodus of willing lenders" to closely held corporations,[4] despite the wide-ranging risk of reverse piercing faced by unsecured creditors in tax cases given the embrace of that doctrine by the Internal Revenue Service, as well as bankruptcy cases. A. Lvov, "Preserving Limited Liability: Mitigating the Inequities of Reverse Veil Piercing with a Comprehensive Framework," 18 U.C. Davis Bus. L.J. 161, 192 (2017–2018); see also N. Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice," 85 St. John's L. Rev. 1147, 1185–86 (2011).

[3] I note that Virginia also requires "a litigant who seeks reverse veil piercing [to] prove the necessary standards by clear and convincing evidence." *C.F. Trust, Inc.* v. *First Flight L.P.*, supra, 266 Va. 13. Because this issue has not been raised by the parties, I need not consider further whether Connecticut law imposes a higher standard of proof in veil piercing cases.

[4] As the Colorado Supreme Court has noted, these equitable limitations, including those embraced by the majority in this case, render outsider reverse veil piercing "unlikely to impact many business entities other than a limited number of closely held corporations with few shareholders or only a single shareholder." *In re Phillips*, supra, 139 P.3d 647.

Finally, to the extent that that some authorities have suggested that we should wait for the legislature to create a reverse piercing remedy because corporate entities are creatures of statute; see *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 304 Conn. 160–61 (*Zarella, J.*, concurring); see also *Acree* v. *McMahan*, 276 Ga. 880, 883, 585 S.E.2d 873 (2003); I observe that this court has, for more than a century, recognized that "the general rule, which recognizes the individuality of corporate entities and the independent character of each in respect to their corporate transactions and the obligations incurred by each in the course of such transactions will be disregarded, where, as here, the interests of justice and righteous dealing so demand." *Connecticut Co.* v. *New York, N. H. & H. R. Co.*, 94 Conn. 13, 26–27, 107 A. 646 (1919). The equitable doctrine of piercing the corporate veil has evolved from this general principle, as it is well established that "[c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor," in the "exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, supra, 139; see, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 236; *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 555–57, 447 A.2d 406 (1982); *Zaist* v. *Olson*, 154 Conn. 563, 573–74, 227 A.2d 552 (1967); *Hoffman Wall Paper Co.* v. *Hartford*, supra, 114 Conn. 535. That the legislature has, to this point, taken no action applicable to this case in response to this deeply established body of case law,

which exists in concert with our various business entity statutes, suggests to me that we do not overstep our institutional bounds by incrementally extending the doctrine, in its "reverse" form, only to those corporate entities that amount to mere shells in abuse of the privileges extended by our business entity statutes.[5] See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540, 574, 175 A.3d 1 (2018) (*Robinson, J.*, concurring) (recognizing common-law cause of action for breach of patient confidentiality because it complemented federal and state confidentiality statutes); see also *Sky Cable, LLC* v. *DIRECTV, Inc.*, 886 F.3d 375, 389 (4th Cir. 2018) (concluding that Delaware law would recognize outside reverse piercing of corporate veil with respect to limited liability company that is "sham entity" as "alter ego of its sole member" given "Delaware courts' traditional power . . . to look through these legal fictions" and because not recognizing doctrine "would limit Delaware's ability to [prevent] the entities that it charters from being used as vehicles

[5] As the majority recognizes in footnote 27 of its opinion, on June 25, 2019, while this appeal was pending after oral argument, the legislature passed No. 19-181 of the 2019 Public Acts (P.A. 19-181), which codifies the instrumentality test for veil piercing and expressly prohibits the use of the reverse veil piercing doctrine or remedy. That legislation was later signed by the governor on July 9, 2019. I agree with the majority's conclusion that P.A. 19-181 does not affect this appeal, given that the legislature has plainly and unambiguously provided that P.A. 19-181, § 3, is "effective from passage and applicable to any civil action filed *on or after the effective date of this section*." (Emphasis added.) See *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 43, 61 A.2d 89 (1948) (effective upon passage means date of governor's signature); *Old Saybrook* v. *Public Utilities Commission*, 100 Conn. 322, 325, 124 A. 33 (1924) (same). Given this plain and unambiguous language with respect to the effect on pending litigation, I conclude that the legislature did not "clearly and unequivocally" express the intent necessary for us to retroactively apply P.A. 19-181 in light of the presumption of prospective application under General Statutes § 55-3, because this change to the remedial scheme would effectively "[bring] about changes to the substantive rights" of the plaintiff. (Internal quotation marks omitted.) *In re Daniel H.*, 237 Conn. 364, 372–73, 678 A.2d 462 (1996); see also, e.g., *D'Eramo* v. *Smith*, 273 Conn. 610, 620, 872 A.2d 408 (2005); *Oxford Tire Supply, Inc.* v. *Commissioner of Revenue Services*, 253 Conn. 683, 693–94, 755 A.2d 850 (2000).

for fraud, and would allow solvent debtors to engage in fraud by using [limited liability companies] solely to avoid liability for their debts" [internal quotation marks omitted]).

In adopting the doctrine of reverse veil piercing as a matter of Connecticut law, the majority utilizes a "three part process" to govern the inquiry, under which the outsider must first prove that, "under the instrumentality and/or identity rules, as set forth in traditional veil piercing cases, the corporate entity has been so controlled and dominated that justice requires liability to be imposed . . . ." (Internal quotation marks omitted.) See also, e.g., *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 232–33 (identifying factors to consider under instrumentality and identity rules). If the outsider prevails on the first part of the inquiry, the trial court must also consider "the impact of reverse piercing on innocent shareholders and creditors" and "whether adequate remedies at law are available" in deciding whether to reverse pierce the corporate veil. In part III B of its opinion, the majority upholds the trial court's application of the reverse piercing doctrine to those entities only when it did not harm innocent parties, such as nonculpable employees and investors, and the movement of assets between entities made it nearly impossible for the plaintiff, Robert J. McKay, to attach those assets in satisfaction of the debts owed.[6] I emphasize that my agreement with part III of the majority opinion is dependent on that distinction, and I would not permit the doctrine to be employed absent extreme abuse of the corporate form, or in cases where its application would injure a corporation's inno-

[6] Specifically, in part III B 1 of its opinion, the majority concludes that the trial court properly reverse pierced the corporate veil of several corporate defendants, namely, Sapphire Development, LLC, Lurie Investments, LLC, R.I.P.P. Corp., and 2 Great Pasture Road Associates, LLC, while part III B 2 of the majority's opinion affirms the judgment of the trial court declining to disturb the corporate veil of defendants Solaire Development, LLC, Solaire Management, LLC, Solaire Funding, Inc., and W.W. Land Company, LLC.

cent shareholders or employees.[7] I accept that these equitable limitations render outside reverse veil piercing "unlikely to impact many business entities other than a limited number of closely held corporations with few shareholders or only a single shareholder." *In re Phillips*, supra, 139 P.3d 647. Nevertheless, the reverse piercing doctrine retains value as a matter of law in circumstances such as the present case, where traditional collection procedures have been frustrated by corporate forms that are nothing more than shells utilized to perpetrate injustice by hiding assets in evasion of the New York judgment.

Accordingly, I join the majority opinion, insofar as I read part III of that opinion to adopt a very limited approach to the doctrine of reverse piercing of the corporate veil for cases filed before July 9, 2019.

STATE OF CONNECTICUT *v.* DIVENSON PETION (SC 19938)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Pursuant to statute (§ 53a-59 [a] [1]), a person is guilty of assault in the first degree when, with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument.

Pursuant further to statute (§ 53a-3 [4]), "serious physical injury" means physical injury that, inter alia, causes serious disfigurement.

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[7] Accordingly, I would overrule the Appellate Court's decision in *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, to the extent that it adopted a version of outside reverse veil piercing that mirrors traditional veil piercing, and does not incorporate the additional two factors identified by the majority. See id., 151 ("[w]e . . . recognize that under the appropriate circumstances, i.e., when the elements of the identity or instrumentality rule have been established, a reverse pierce is a viable remedy that a court may employ when necessary to achieve an equitable result and when unfair prejudice will not result"); but see id., 151 n.14 (noting criticisms of doctrine, namely bypass of normal judgment collection procedures and unfair prejudice to innocent shareholders, but stating that they were "not implicated" by facts of case).

Convicted of two counts of the crime of assault in the first degree in connection with a knife attack on two victims, B and R, the defendant appealed to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support a conviction of first degree assault as to B because the state failed to demonstrate that she suffered a serious physical injury in the form of serious disfigurement. The defendant had attacked R during a dispute, and B, in an attempt to stop the defendant from injuring R, inserted herself between the two men. In the process, the defendant cut B's arm. At trial, the state introduced testimony from B's treating physician and two sets of photographs, one set taken shortly after medical treatment had been rendered and one set taken thirty months later, at the time of trial. Each set included one photograph magnifying B's injuries at close range and one photograph in which B displayed the injured area of her arm from a sufficient distance to capture the area from her torso to her head. The evidence established that B had a 1.38 inch abrasion and a 0.30 inch laceration just above her left elbow, and a 1.57 inch laceration just below her left elbow on her forearm. The smaller laceration was closed with a single suture, whereas the larger laceration required ten sutures. At the time of trial, the larger laceration had left a scar approximately the same length as that laceration and was a slightly lighter tone than the surrounding skin. No other injury was apparent, and B's treating physician testified that the scar would remain in its present condition. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The state failed to prove beyond a reasonable doubt that the defendant had committed assault in the first degree by inflicting serious physical injury on B with a dangerous instrument, the evidence having failed to establish that B suffered serious disfigurement as a result of the defendant's assault, and, accordingly, the Appellate Court's judgment was reversed insofar as that court upheld the defendant's conviction of assault in the first degree as to B, and the case was remanded with direction to vacate the defendant's sentence and for resentencing on the remaining count: although the defendant's claim ordinarily is a factual question for the jury, this court determined that there was a legal distinction between physical injury and serious physical injury that was not a purely subjective matter, and, having determined that there was no definition in the Penal Code of the foundational term, disfigurement, this court looked to extratextual sources, including dictionary definitions, Connecticut's workers' compensation scheme, and to definitions and factors identified by other jurisdictions, to conclude that serious disfigurement is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer; moreover, the determination of whether a physical injury caused serious disfigurement shall include consideration of such factors as the duration

of the disfigurement, its location, its size, and its overall appearance, as well as the fact that serious disfigurement need not be permanent or in a location of the body that is readily visible to others; applying that definition and the relevant factors to B's injuries, this court concluded that the evidence established that, although B sustained a disfigurement, in the form of a permanent scar, that disfigurement was not of a magnitude that objectively could be found to substantially detract from B's appearance, as B's scar was not in a prominent location, and was relatively small in size, uniform in shape and otherwise unremarkable in its appearance.

2. The state could not prevail on its claim that, in light of this court's determination that the evidence was insufficient to sustain the defendant's conviction of first degree assault as to B, it should not direct a judgment of acquittal on that charge but, instead, should direct that the judgment be modified to reflect the defendant's conviction of the lesser included offense of assault in the second degree, the highest lesser included offense that requires proof of physical injury rather than serious physical injury: the state conceded that, in accordance with recent precedent, *State* v. *LaFleur* (307 Conn. 115), this court must direct a judgment of acquittal on the defendant's conviction of first degree assault as to B, when the evidence is insufficient to sustain that conviction and the jury was not instructed on a lesser included offense, and the state failed to provide sufficient justification for overruling *LaFleur* in favor of a rule pursuant to which a conviction suffering from evidentiary insufficiency would be modified to the highest lesser included offense supported by the evidence, unless the defendant can prove that the absence of a jury instruction on the lesser included offense was prejudicial; moreover, there was no indication that the rule in *LaFleur* is unworkable, as the state always can request an instruction on a lesser included offense that is supported by the evidence, and, as both parties were aware at trial that *LaFleur* was the controlling law, it would be unfair to the defendant to change the law on appeal because, had the defendant known that the judgment would be modified if he succeeded in challenging his conviction on the ground of evidentiary insufficiency, he might have sought an instruction not only on assault in the second degree but also on other lesser offenses supported by the evidence.

(*One justice concurring separately*; *three justices dissenting in one opinion*)

Argued November 13, 2018—officially released July 23, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defen-

dant appealed to the Appellate Court, *DiPentima*, *C. J.*, *and Prescott and Beach*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed in part*; *further proceedings.*

Jennifer B. Smith, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. Whether an assault results in physical injury or *serious* physical injury can have profound ramifications for the victim. Consequently, substantially greater punishment may be imposed for the latter injury than the former.[1] Although this court has acknowledged "the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins" (internal quotation marks omitted); *State* v. *Ovechka*, 292 Conn. 533, 546–47, 975 A.2d 1 (2009); see also *State* v. *Almeda*, 211 Conn. 441, 451, 560 A.2d 389 (1989); the present case provides an opportunity to illuminate that distinction. In particular, we use this occasion to examine the parameters that should be used by the trier of fact to assess whether a defendant has inflicted serious physical injury in the form of serious disfigurement. See General Statutes § 53a-3 (4).

The defendant, Divenson Petion, appeals from the Appellate Court's judgment affirming his conviction of two counts of assault in the first degree in violation of

[1] An exception, not relevant to the present case, arises when a defendant inflicts physical injury by means of the discharge of a firearm. See footnote 2 of this opinion.

General Statutes § 53a-59 (a) (1).[2] See *State* v. *Petion*, 172 Conn. App. 668, 669–70, 687, 161 A.3d 618 (2017). The defendant claims that the forearm scar sustained by one of the two victims was an insufficient basis for the jury to find the serious physical injury necessary to support that charge. The state disagrees but requests, in the event that we conclude otherwise, that a judgment of acquittal not be rendered on that charge and, instead, that the judgment be modified to reflect a conviction of the lesser included offense of assault in the second degree; see General Statutes § 53a-60 (a) (2); and the case be remanded for resentencing. We conclude that the evidence was insufficient to support the challenged conviction. We further conclude that, under *State* v. *LaFleur*, 307 Conn. 115, 51 A.3d 1048 (2012), the state is not entitled to have the defendant's conviction modified. Therefore, we reverse in part the Appellate Court's judgment.

I

The Appellate Court's opinion sets forth the facts that the jury reasonably could have found; see *State* v. *Petion*, supra, 172 Conn. App. 670–72; which we summarize as follows. In 2008, the defendant began dating Rosa Bran. Bran gave birth to the defendant's daughter

[2] General Statutes § 53a-59 (a) provides: "A person is guilty of assault in the first degree when: (1) *With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument*; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm." (Emphasis added.)

in February, 2010. Bran also had a son from a prior relationship. After the birth of his daughter, the defendant's romantic relationship with Bran ended. However, they remained in contact, and the defendant occasionally would visit his daughter, sometimes showing up unannounced. The defendant told Bran that he did not want other men around his daughter.

Shortly before the May, 2012 incident giving rise to the criminal charges at issue, Bran resumed a friendship with a former boyfriend, Robert Raphael. On the day of the incident, Bran invited Raphael to her apartment, and he arrived in the early afternoon. In addition to Bran and her two children, her cousin's two children were present. Later that afternoon, there was a knock on the door. Bran answered the door, expecting that it was her cousin arriving to pick up her children, but it was the defendant. He asked to see his daughter. Bran explained that it was not a good time because the child was asleep.

The defendant then saw Raphael. The defendant became angry, pushed Bran aside, and entered the apartment. He began to shout at Raphael to get out of the apartment. Raphael did not want to leave Bran and the children alone with the defendant in his agitated state, and told the defendant that he was staying. In response, the defendant began pushing and punching Raphael. As Raphael retreated further into the apartment, the defendant pursued him. The defendant pulled out a knife from his pocket and slashed Raphael across the face, cutting from Raphael's ear to along his jaw bone, deeply enough to damage a facial nerve and cut a branch of his jugular vein. Bran inserted herself between the two men during the confrontation, hoping to stop the defendant from injuring Raphael. In the process, the defendant cut Bran on her left arm. Raphael, who was bleeding profusely, ran out of the

apartment, got in his car, and drove himself to the hospital.[3]

The defendant repeatedly apologized to Bran and then left the apartment. Bran was not immediately aware that she had been cut. She realized that she had been injured when her son came downstairs, alerted Bran that she was bleeding, and grabbed a towel to cover her wound. Shortly after the incident, Bran's cousin arrived to pick up her children, and she drove Bran to the hospital.

When she arrived at the hospital, Bran had an abrasion and two lacerations on her left arm, one measuring three-quarters of one centimeter and another measuring four centimeters.[4] The smaller laceration was treated with a single suture. The larger laceration was closed with ten sutures, which left a scar after the laceration healed.

The record reveals the following additional facts. The state charged the defendant with two counts of assault in the first degree in violation of § 53a-59 (a) (1). The first count alleged that, with the intent to cause serious physical injury to Raphael, the defendant caused such injury to Raphael by means of a dangerous instrument. The second count alleged that, with the intent to cause serious physical injury to Raphael, the defen-

[3] Raphael was in critical condition when he was admitted to the hospital. *State* v. *Petion*, supra, 172 Conn. App. 672 n.2. His injuries required immediate surgery and resulted in permanent scarring and nerve damage to his face. Id.

[4] Bran's treating physician testified that Bran's vital signs—blood pressure and respiratory rate—were "grossly abnormal" when he first had contact with her but acknowledged that the elevated levels were a function of adrenaline when someone is injured. He offered no testimony as to whether or how long these levels were sustained; nor did he suggest that these levels created a substantial risk of death, or caused a serious impairment of health or serious loss or impairment of the function of any bodily organ. See General Statutes § 53a-3 (4) (defining serious physical injury). Bran was not admitted to the hospital for observation and received no treatment other than sutures for the lacerations.

dant caused such injury to Bran by means of a dangerous instrument.

At trial, the defendant presented an alibi witness, a family friend. At the close of evidence, the defendant moved for a judgment of acquittal on the charge of first degree assault as to Bran. The court denied the motion. Neither the defendant nor the state elected to have the jury charged on any lesser included offense. The jury returned a guilty verdict on both counts. On each count, the trial court imposed a seventeen year term of imprisonment, followed by three years of special parole, to run concurrently.

The defendant appealed from the judgment of conviction to the Appellate Court. He argued, in relevant part, that there was insufficient evidence to support a conviction of first degree assault as to Bran because the state had failed to demonstrate beyond a reasonable doubt that she suffered a " 'serious physical injury.' "[5] Id., 669. The Appellate Court agreed with the state "that the evidence presented to the jury showed that one of the two lacerations that Bran received resulted in a significant and readily visible scar and that, under our law, a jury reasonably could have found that such scarring constituted a serious disfigurement and, therefore, a serious physical injury." Id., 673. The Appellate Court affirmed the judgment of conviction. Id., 687.

We thereafter granted the defendant's petition for certification to appeal, limited to the following issue: "In rejecting the defendant's claim that there was insufficient evidence to support his conviction of assault in the first degree in violation of . . . § 53a-59 (a) (1) with

[5] The defendant challenged the sufficiency of the evidence only with respect to the assault charge involving Bran. The defendant contended that prosecutorial improprieties deprived him of a fair trial with respect to the charges of assault as to both Raphael and Bran. The Appellate Court rejected that claim; see *State* v. *Petion*, supra, 172 Conn. App. 678; and the defendant has not challenged that aspect of the court's decision.

respect to . . . Bran, did the Appellate Court properly conclude that a jury reasonably could have found that the one and one-half inch scar on her forearm constituted serious disfigurement and, therefore, a serious physical injury?" *State* v. *Petion*, 326 Conn. 906, 163 A.3d 1205 (2017).

In their responses to this question, the parties devote significant portions of their analyses to a comparison between those injuries that the Appellate Court has deemed sufficient to support a jury's finding of serious disfigurement in other cases and Bran's injury in the present case. Although they disagree as to which side of the line the present case falls, they agree that juries would be aided in making this determination by factors to guide them.[6]

We do not find the comparative approach taken by the parties to be useful here, particularly because the Appellate Court had not examined the meaning of "serious disfigurement" in any of these cases,[7] and this court previously had given no guidance on the matter. Thus, before we can consider the evidence, we must ascertain the meaning of the legal standard against which we assess that evidence. See *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012). The statutory text is our lodestar in this endeavor, and we consider relevant extratextual sources to illuminate any ambiguity therein to ascertain legislative intent. See General Statutes § 1-2z. Insofar as any ambiguity exists, "[i]t is a fundamental tenet of our law to resolve doubts in the enforcement

[6] Although the trial court's charge provided no such factors to guide the jury, the defendant does not raise a claim of instructional error.

[7] In one earlier case, cited by the Appellate Court in the present case; see *State* v. *Petion*, supra, 172 Conn. App. 674–75; the Appellate Court considered dictionary definitions of "disfigurement" but did not further consider how "serious" modified that meaning. See *State* v. *Barretta*, 82 Conn. App. 684, 689, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004). By declining to use these cases as benchmarks, we do not intend to express a view as to whether they were correctly decided.

of a [P]enal [C]ode against the imposition of a harsher punishment." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, 160.

The defendant was convicted of violating § 53a-59 (a) (1), which provides in relevant part: "A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of . . . a dangerous instrument . . . ."[8] The Penal Code in turn defines certain essential terms. " 'Physical injury' means impairment of physical condition or pain . . . ." General Statutes § 53a-3 (3). " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4).

These definitions plainly reflect a legislative intention to establish a material degree of difference between mere physical injury and *serious* physical injury. This differentiation is reflected in the severity of punishment attendant to each. Assault resulting in physical injury, unless inflicted by discharge of a firearm, carries a maximum term of imprisonment of five years, whereas assault resulting in serious physical injury carries a maximum term of imprisonment of twenty years. See General Statutes §§ 53a-35a (6) and (7), 53a-59 (b) and 53a-60 (b). Thus, "[a]lthough it may often be difficult to distinguish between the two, such a distinction *must* be drawn; a person can be found guilty of assault in the first degree under . . . § 53a-59 [a] [1] only if he 'causes *serious* physical injury to another person.' "

[8] " 'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7).

(Emphasis in original.) *State* v. *Rossier*, 175 Conn. 204, 207, 397 A.2d 110 (1978).

We need not attempt, in the present case, to draw comprehensive distinctions for general application. Our focus is on one type of serious physical injury—serious disfigurement. See General Statutes § 53a-3 (4).

We begin by examining the foundational term "disfigurement." Our Penal Code does not define this term. Neither did New York's Penal Code, from which our code's relevant definitions and many of its core provisions, such as our assault provisions, were drawn. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 671–73, 998 A.2d 1 (2010); *State* v. *Havican*, 213 Conn. 593, 601, 569 A.2d 1089 (1990); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1969 Sess., p. 11; Report of the Commission to Revise the Criminal Statutes (1967) pp. 114–15, reprinted in 1 Law and Legislative Reference Unit, Connecticut State Library, Connecticut Legislative Histories Landmark Series: 1969 Public Act No. 828 (2005). Under the common meaning at the time our code was adopted in 1969, "disfigurement" was defined simply as "something that disfigures, as a scar." The Random House Dictionary of the English Language (Unabridged Ed. 1966) p. 411. "Disfigure," in turn, was commonly defined as "to mar the appearance or beauty of; deform"; id.; "to spoil the appearance of"; Webster's Seventh New Collegiate Dictionary (1969) p. 239; or "to deform; to impair, as shape or form; to mar; to deface; to injure the appearance or attractiveness of . . . ." Webster's New Twentieth Century Dictionary (2d Ed. 1964) p. 524. Legal dictionaries of the day reflected a similar definition for "disfigurement" that had been adopted under workers' compensation law in some jurisdictions: "That which impairs or injures the beauty, symmetry, or appearance of a person . . . that which renders unsightly, misshapen, or imperfect, or deforms in some manner." Black's Law Dictionary (4th Ed. 1968)

p. 554; accord Ballentine's Law Dictionary (3d Ed. 1969) p. 554. Our legislature subsequently adopted a substantially similar definition for our workers' compensation scheme. See Public Acts 1991, No. 91-339, § 1, codified as amended at General Statutes § 31-275 (8) (" '[d]isfigurement' means impairment of or injury to the beauty, symmetry or appearance of a person that renders the person unsightly, misshapen or imperfect, or deforms the person in some manner, or otherwise causes a detrimental change in the external form of the person").

Although this court has not previously considered whether this statutory definition would apply to the Penal Code, we note that every other jurisdiction that has considered the term's meaning as applied to penal statutes generally or assault provisions specifically, including New York, has adopted a definition of disfigurement that largely conforms to our workers' compensation definition.[9] Therefore, we conclude that this

[9] See, e.g., *Akaran* v. *State*, Docket No. A-8690, 2005 WL 1026992, *4 (Alaska App. May 4, 2005) (defining disfigurement as "an injury [that] mars the [victim's] physical appearance"); *Williams* v. *State*, 248 Ga. App. 316, 318, 546 S.E.2d 74 (2001) (applying definition of disfigurement "as that which impairs or injures the appearance of a person"); *State* v. *Silva*, 75 Haw. 419, 433, 864 P.2d 583 (1993) ("a 'disfigurement' is, in relevant part, 'something that disfigures, as a scar,' while to 'disfigure' is 'to mar the effect or excellence of' "); *James* v. *State*, 755 N.E.2d 226, 230 (Ind. App.) (applying definition of disfigure as " 'to make less complete, perfect or beautiful in appearance or character: deface, deform, mar' "), appeal denied, 761 N.E.2d 423 (Ind. 2001); *Thomas* v. *State*, 128 Md. App. 274, 303, 737 A.2d 622 (applying definition of disfigurement as " 'an externally visible blemish or scar that impairs one's appearance' "), cert. denied, 357 Md. 192, 742 A.2d 521 (1999); *State* v. *Bledsoe*, 920 S.W.2d 538, 540 (Mo. App. 1996) (disfigure "means to deface or mar the appearance or beauty of someone"); *State* v. *Clark*, 974 A.2d 558, 572 (R.I. 2009) (disfigurement means " 'that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner' "); see also *State* v. *Ferrer*, Docket No. 47687-8-II, 2018 WL 4896669, *2 (Wn. App. October 9, 2018) (trial court instructed jury that "[d]isfigurement means that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner" [internal quotation marks omitted]) (decision without published opinion, 5 Wn. App. 2d 1034 [2018]).

meaning should apply to our Penal Code. See General Statutes § 1-1 (a) (directing that words that have acquired particular and appropriate meaning in law be construed as such and otherwise be construed in accordance with commonly approved usage).

We next consider the difference between disfigurement and *serious* disfigurement. At the time of the Penal Code's adoption, the common meaning of "serious," specifically in relation to injury, was "having important or dangerous possible consequences . . . ." Webster's Seventh New Collegiate Dictionary, supra, p. 792. Other jurisdictions have applied similar definitions to "serious" as a modifier to "disfigurement" in their penal statutes:[10] "grave, or great"; *Williams* v. *State*, 248 Ga.

[10] Penal laws in the majority of jurisdictions also define serious physical or bodily injury to include serious disfigurement, although many of those jurisdictions add a durational term (e.g., protracted, prolonged, permanent). See Ala. Code § 13A-1-2 (14) (2015) ("serious and protracted disfigurement"); Alaska Stat. § 11.81.900 (b) (58) (B) ("serious and protracted disfigurement") (LexisNexis 2012); Ariz. Rev. Stat. Ann. (Cum. Supp. 2018) § 13-105 (39) ("serious and permanent disfigurement"); Cal. Penal Code § 243 ("serious disfigurement" for purposes of assault statutes) (Deering Supp. 2018); Colo. Rev. Stat. § 18-1-901 (3) (p) (2017) ("substantial risk of serious permanent disfigurement"); Del. Code. Ann. tit. 11, § 222 (26) (Supp. 2012) ("serious and prolonged disfigurement"); Ga. Code Ann. § 16-5-24 (a) (Supp. 2018) ("seriously disfiguring" for purposes of aggravated battery); Haw. Rev. Stat. § 707-700 (2014) ("serious, permanent disfigurement"); Ind. Code Ann. § 35-31.5-2-292 (1) (LexisNexis 2012) ("serious permanent disfigurement"); Iowa Code § 702.18 (2001) ("serious permanent disfigurement"); Ky. Rev. Stat. Ann. § 500.080 (15) (LexisNexis Cum. Supp. 2018) ("serious and prolonged disfigurement"); Me. Rev. Stat. Ann. tit. 17-a, § 2 (23) (Cum. Supp. 2018) ("serious, permanent disfigurement"); Md. Code Ann., Criminal Law § 3-201 (d) (2) (i) (LexisNexis 2012) ("permanent or protracted serious . . . disfigurement"); Mass. Ann. Laws ch. 265, § 13A (c) (LexisNexis 2010) ("permanent disfigurement" for purposes of assault and battery); Minn. Stat. § 609.02 (8) (West 2018) ("serious permanent disfigurement"); Mo. Rev. Stat. § 556.061 (44) (Cum. Supp. 2018) ("serious disfigurement"); Mont. Code Ann. § 45-2-101 (66) (a) (ii) (2017) ("serious permanent disfigurement"); Neb. Rev. Stat. § 21-109 (21) (2016) ("serious permanent disfigurement"); Nev. Rev. Stat. 0.060 (1) (2017) ("serious, permanent disfigurement"); N.J. Stat. Ann. § 2C:11-1 (b) (West 2015) ("serious, permanent disfigurement"); N.M. Stat. Ann. § 30-1-12 (A) (2004) ("serious disfigurement"); N.Y. Penal Law § 10.00 (10) (McKinney Cum. Supp. 2019) ("serious and protracted

App. 316, 318, 546 S.E.2d 74 (2001); "giving cause for apprehension; critical"; *State* v. *Silva*, 75 Haw. 419, 434, 864 P.2d 583 (1993); "grave and not trivial in quality or manner." *State* v. *Clark*, 974 A.2d 558, 573 (R.I. 2009).

Thus, just as inflicting serious physical injury is deemed to be conduct of significantly greater culpability than inflicting physical injury, it is evident that " 'to disfigure . . . seriously' must be to inflict some harm substantially greater than the minimum required for 'disfigurement.' " *People* v. *McKinnon*, 15 N.Y.3d 311, 315, 937 N.E.2d 524, 910 N.Y.S.2d 767 (2010). Other jurisdictions that have given a unified definition to serious disfigurement under their penal laws, rather than

disfigurement"); N.C. Gen. Stat. 14-32.4 (a) (2017) ("serious permanent disfigurement" for purposes of assault); N.D. Cent. Code § 12.1-01-04 (27) (Supp. 2017) ("serious permanent disfigurement"); Or. Rev. Stat. § 161.015 (8) (2017) ("serious and protracted disfigurement"); 18 Pa. Stat. and Const. Stat. Ann. § 2301 (West 2015) ("serious, permanent disfigurement"); R.I. Gen. Laws § 11-5-2 (c) (Cum. Supp. 2018) ("serious permanent disfigurement"); S.C. Code Ann. § 16-3-600 (A) (1) (2015) ("serious permanent disfigurement"); S.D. Codified Laws § 22-18-1.5 (2017) ("serious permanent disfigurement" for purposes of assault); Tex. Penal Code Ann. § 1.07 (a) (46) (Cum. Supp. 2018) ("serious permanent disfigurement"); Utah Code Ann. § 76-1-601 (11) (LexisNexis 2012) ("serious permanent disfigurement"); Wn. Rev. Code Ann. § 9A.04110 (b) and (c) (West 2015) (substantial bodily harm includes "temporary but substantial disfigurement"; great bodily harm includes "serious permanent disfigurement"); Wis. Stat. § 939.22 (Cum. Supp. 2018) ("serious permanent disfigurement").

Other jurisdictions that define serious physical injury to include disfigurement but do not use the term "serious" include the following: Ark. Code Ann. § 5-1-102 (21) (2013) ("protracted disfigurement"); Idaho Code § 18-907 (West 2016) ("permanent disfigurement" for purposes of aggravated battery); 720 Ill. Comp. Stat. 5/12-3.05 (West 2017) ("permanent . . . disfigurement" for purposes of aggravated battery); Kan. Stat. Ann. § 21-5413 (b) (1) (A) (Cum. Supp. 2018) ("disfigurement" for purposes of aggravated battery); La. Rev. Stat. Ann. § 14:34.7 (B) (3) (2016) ("protracted and obvious disfigurement"); Ohio Rev. Code Ann. § 2901.01 (A) (5) (d) (West Supp. 2018) ("permanent disfigurement" or "temporary, serious disfigurement"); Okla. Stat. Ann. tit. 21, § 646 (B) (West 2018) ("protracted and obvious disfigurement"); Tenn. Code Ann. § 39-11-106 (a) (34) (D) (West 2018) ("protracted or obvious disfigurement"); Wyo. Stat. Ann. § 6-1-104 (x) (C) (2013) ("severe disfigurement").

define each word separately, have defined it as " 'an injury [that] mars the [victim's] physical appearance and causes a degree of unattractiveness sufficient to bring negative attention or embarrassment' "; *Akaran* v. *State*, Docket No. A-8690, 2005 WL 1026992, *4 (Alaska App. May 4, 2005); an injury that would "make the victim's appearance distressing or objectionable to a reasonable person observing her"; *People* v. *McKinnon*, supra, 316; or a "significant cosmetic deformity caused by the injury." *Hernandez* v. *State*, 946 S.W.2d 108, 113 (Tex. App. 1997). Cf. *People* v. *McKinnon*, supra, 315 (explaining that "serious" disfigurement would not rise to level of "severe" disfigurement, such that it need not be " 'abhorrently distressing, highly objectionable, shocking or extremely unsightly' to a reasonable person"). In defining a similar term in our workers' compensation scheme, our legislature defined "significant disfigurement" as "any disfigurement that is of such a character that it substantially detracts from the appearance of the person bearing the disfigurement."[11] Public Acts 1991, No. 91-339, § 1, codified at General Statutes (Rev. to 1993) § 31-275 (8). Because "serious" means, at a minimum, "significant"; see Webster's Seventh New Collegiate Dictionary, supra, pp. 792, 809 (defining "serious" as "having important or dangerous possible consequences," and "significant" as "important, weighty"); see also *Fisher* v. *Blankenship*, 286 Mich. App. 54, 66, 777 N.W.2d 469 (2009) (disfigurement will be considered serious if it is significant); we also conclude that applying a similar definition to the Penal Code would be appropriate.

[11] The legislature repealed this definition when it decided to limit the circumstances under which compensation would be provided for serious disfigurement or scarring, adding instead language to the statute prescribing those particular limitations. See Public Acts 1993, No. 93-228, §§ 1, 19, codified at General Statutes (Rev. to 1995) § 31-308 (c) (precluding compensation "for any scar or disfigurement which is not located on [A] the face, head or neck, or [B] any other area of the body which handicaps the employee in obtaining or continuing to work").

In considering how to apply this definition to the evidence in a given case, the present case requires consideration of whether, and the extent to which, the duration of the disfigurement is relevant. Unlike many other jurisdictions, our Penal Code does not expressly require an injury to persist for any particular duration to qualify as a serious physical injury, including serious disfigurement. See footnote 11 of this opinion. Early drafts of our Penal Code defined "serious physical injury" to include "serious *and protracted* disfigurement, *protracted* impairment of health or *protracted* loss or impairment of any of the bodily functions." (Emphasis added.) Report of the Commission to Revise the Criminal Statutes, supra, p. 6; Proposed House Bill No. 7182, § 4 (4), 1969 Jan. Sess. In the substitute bill that was favorably reported out of committee, "serious" was substituted for "protracted" where the former had not been included; see Substitute House Bill No. 7182, 1969 Sess.; without explanation.

We do not view this change to mean that the duration of the injury is not a proper consideration under § 53a-59 (a) (1). The term "serious" is broader than "prolonged" in that it covers more than only the temporal dimension, and it would appear that the legislature decided that the broader term was all that was necessary. See *State* v. *Bledsoe*, 920 S.W.2d 538, 540 (Mo. App. 1996) ("[a]lthough no longer statutorily required . . . permanency of disfigurement is relevant, as a matter of evidence, on the element of seriousness" [citations omitted]). For example, a transitory blemish to one's appearance that heals without medical treatment (e.g., a bruise, an abrasion) could hardly be deemed serious disfigurement. See *Williams* v. *State*, supra, 248 Ga. App. 319 ("[i]n every aggravated battery based upon a serious disfigurement, including those in which the disfigurement was temporary, the injury inflicted was more than a superficial wound, that is, a scrape, bruise,

discoloration, or swelling"). Conversely, injuries of more lasting duration are more likely to be serious, even when they heal without medical intervention.[12] See, e.g., *State* v. *Barretta*, 82 Conn. App. 684, 689–90, 846 A.2d 946 (there was sufficient evidence to establish serious disfigurement when, as result of being viciously beaten with baseball bat, victim sustained contusions, severe bruising, and abrasions all over his body), cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); *State* v. *Hughes*, 469 S.W.3d 894, 901 (Mo. App. 2015) (there was sufficient evidence to establish serious disfigurement when victim was badly beaten in assault, but injuries would all heal: victim had black eye, swollen eye barely open, bruising around neck from scarf used

[12] Although we have no evidence that this substantive consideration motivated the legislature's decision to eliminate "prolonged," the omission of any specific durational requirement raises a question about the impact that surgery has in terms of minimizing the period of disfigurement. In some jurisdictions that require prolonged or permanent disfigurement, courts have considered the seriousness of the condition only after surgery. See, e.g., *State* v. *Malufau*, 80 Haw. 126, 131, 906 P.2d 612 (1995) (under statute requiring serious, permanent disfigurement, court expressed disapproval of case relying on physician's testimony regarding potential severity of victim's injuries in absence of medical treatment); *People* v. *Rosado*, 88 App. Div. 3d 454, 454–55, 930 N.Y.S.2d 10 (2011) (assessing sufficiency of evidence of serious disfigurement in relation to victim's appearance after his broken nose and chipped teeth were repaired by surgery; likelihood, and not possibility, of future adverse impact on appearance was relevant consideration), appeal denied, 18 N.Y.3d 928, 965 N.E.2d 969, 942 N.Y.S.2d 467 (2012). In some other jurisdictions, "the relevant issue was the disfiguring and impairing quality of the bodily injury *as it was inflicted*, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment." (Emphasis in original; internal quotation marks omitted.) *Fancher* v. *State*, 659 S.W.2d 836, 838 (Tex. App. 1983); see, e.g., *Lenzy* v. *State*, 689 S.W.2d 305, 310 (Tex. App. 1985) (concluding that evidence established protracted loss or impairment of function of any bodily member when victim's teeth were fractured and their utility was restored by performance of root canals and installation of porcelain crowns, when dentist's testimony established that, "without his remedial work and treatment, the teeth in question would have been lost or their use substantially impaired"). We note that the former approach would appear to allow the severity of the crime to depend on the fortuity of the level of care that the victim received or was able to afford.

to choke her, bruising and discoloration on both cheeks, scratches on right side of mouth, and abrasions to lip).

In the same way that permanence is not a necessary condition for serious disfigurement; cf. General Statutes § 53a-59 (a) (2) (intent and effect of disfiguring another person "seriously *and permanently*" is one basis of assault in first degree [emphasis added]);[13] neither is it a sufficient condition, in and of itself, to establish serious disfigurement. We are mindful that some of our Appellate Court's decisions appear to suggest that, whenever a defendant inflicts an injury that leaves a permanent scar, the evidence would be sufficient to permit the trier of fact to determine that serious disfigurement exists. See, e.g., *State* v. *Griffin*, 78 Conn. App. 646, 655 n.3, 828 A.2d 651 (2003) ("[a] permanent scar constitutes serious and permanent disfigurement"). But see *State* v. *Huckabee*, 41 Conn. App. 565, 570–71, 677 A.2d 452 ("[a] bullet wound is not per se serious physical injury"), cert. denied, 239 Conn. 903, 682 A.2d 1009 (1996). We agree with those jurisdictions that have recognized that, because any visible scar would mar the victim's appearance and thus constitute disfigurement, the legislative choice of "serious" disfigurement evidences an intent to require the presence of some other factor(s) in addition to permanence to render a scar a "serious" disfigurement. See, e.g., *Saelee* v. *State*, Docket No. A-10004, 2011 WL 807391, *9 (Alaska App. March 2, 2011) ("Even in the photographic exhibit, it is difficult to see this scar if one is not looking closely. If we were to declare this evidence sufficient to establish

[13] This court has similarly concluded that other forms of serious physical injury need not be permanent. See *State* v. *Ovechka*, supra, 292 Conn. 542 (deeming temporary but grave condition, loss of sight, to be serious physical injury); *State* v. *Barretta*, supra, 82 Conn. App. 684, 689 ("a victim's complete recovery is of no consequence" in assessing whether victim suffered serious physical injury); *State* v. *Denson*, 67 Conn. App. 803, 811, 789 A.2d 1075 ("[i]t is entirely possible to cause serious physical injury without causing . . . a permanent injury"), cert. denied, 260 Conn. 915, 797 A.2d 514 (2002).

a 'serious and protracted disfigurement,' we would essentially be saying that any visible scar constitutes a 'serious physical injury' for purposes of the assault statutes. We do not believe that the legislature intended this term to be interpreted so broadly."); *State* v. *Silva*, supra, 75 Haw. 433 ("[E]ven a small but noticeable scar on a person's face, for example, is a disfigurement. However, such a scar would certainly not qualify as a 'serious bodily injury' under the statutory definition nor should it."); *Hernandez* v. *State*, supra, 946 S.W.2d 113 ("Simply that an injury causes a scar is not sufficient to establish serious permanent disfigurement. . . . There must be evidence of some significant cosmetic deformity caused by the injury." [Citation omitted.]); see also *State* v. *Hanes*, 790 N.W.2d 545, 554 (Iowa 2010) ("[s]carring may in some circumstances rise to the level of serious permanent disfigurement"); *State* v. *Bledsoe*, supra, 920 S.W.2d 540 ("permanency of disfigurement is relevant . . . on the element of seriousness").

Factors identified by other jurisdictions as relevant to the seriousness of a disfigurement in the form of a scar include its permanence, but also its location, size, and general appearance. See, e.g., *State* v. *Roper*, 136 S.W.3d 891, 898 (Mo. App. 2004); *State* v. *Demers*, Docket No. CX-03-297, 2003 WL 22952813, *1 (Minn. App. December 16, 2003), review denied, Minnesota Supreme Court (February 25, 2004); *People* v. *McKinnon*, supra, 15 N.Y.3d 316. If there is more than one disfiguring feature, courts, including our Appellate Court, have considered the cumulative effect of those features to assess seriousness. See, e.g., *State* v. *Anderson*, 16 Conn. App. 346, 357, 547 A.2d 1368, cert. denied, 209 Conn. 828, 552 A.2d 433 (1988); *Levin* v. *State*, 334 Ga. App. 71, 74, 778 S.E.2d 238 (2015), cert. denied, Georgia Supreme Court, Docket No. S16C0249 (January 11, 2016); *Sloan* v. *State*, Docket No. 49A02-1002-CR-

195, 2010 WL 4813600, *2 (Ind. App. November 24, 2010) (decision without published opinion, 937 N.E.2d 938 [Ind. App. 2010]); *State* v. *Roper*, supra, 898. Similar factors have been identified under our workers' compensation scheme. See General Statutes § 31-308 (c) ("[i]n making any award under this subsection, the commissioner shall consider [1] the location of the scar or disfigurement, [2] the size of the scar or disfigurement, [3] the visibility of the scar or disfigurement due to hyperpigmentation or depigmentation, whether hypertrophic or keloidal, [4] whether the scar or disfigurement causes a tonal or textural skin change, causes loss of symmetry of the affected area or results in noticeable bumps or depressions in the affected area, and [5] other relevant factors").

On the basis of the foregoing analysis, we discern the following distinction between disfigurement and serious disfigurement. "Disfigurement" means impairment of or injury to the beauty, symmetry or appearance of a person that renders the person unsightly, misshapen or imperfect, or deforms the person in some manner, or otherwise causes a detrimental change in the external form of the person. "Serious disfigurement" is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer. In assessing whether an impairment or injury constitutes serious disfigurement, factors that may be considered include the duration of the disfigurement, as well as its location, size, and overall appearance. Serious disfigurement does not necessarily have to be permanent or in a location that is readily visible to others.[14] The jury is not bound by any strict formula in weighing these

[14] The mere fact that a scar is in a location that may be seen only by someone with whom the victim has an intimate relationship would not preclude a finding of serious disfigurement.

factors, as a highly prominent scar in a less visible location may constitute serious disfigurement, just as a less prominent scar in a more visible location, especially one's face, may constitute serious disfigurement.

With these principles in mind, we turn to the defendant's claim that the evidence in the present case is insufficient to establish that Bran suffered a "serious physical injury" in the form of "serious disfigurement." Although ordinarily a factual question for the jury; see, e.g., *State* v. *Almeda*, supra, 211 Conn. 450; *State* v. *Miller*, 202 Conn. 463, 489, 522 A.2d 249 (1987); there is a legal distinction between physical injury and serious physical injury that is not a purely subjective matter, and it is ultimately our responsibility to draw that line. See *State* v. *Rossier*, 175 Conn. 204, 207, 397 A.2d 110 (1978) ("[a]lthough it may often be difficult to distinguish between [physical injury and serious physical injury], such a distinction *must be drawn*" before defendant can be found guilty of assault in first degree under § 53a-59 [a] [1] [emphasis added]); *State* v. *Jeustiniano*, 172 Conn. 275, 281, 374 A.2d 209 (1977) ("[t]he degree of the injuries suffered by [the victim] was a proper question for the jury to decide if sufficient evidence were introduced"); *Hernandez* v. *State*, supra, 946 S.W.2d 113 ("Disfigurement, like beauty, is in the eye of the beholder. However, when distinguishing between 'bodily injury' and 'serious bodily injury' it is, again, a matter of degree. Simply that an injury causes a scar is not sufficient to establish serious permanent disfigurement. . . . There must be evidence of some significant cosmetic deformity caused by the injury." [Citation omitted.]).

"In reviewing the [legal] sufficiency of the evidence concerning this element of assault in the first degree, our task is to construe the evidence in the light most favorable to sustaining the jury's verdict, and then to determine whether any rational trier of fact could have

found that the harm suffered rose to the level of a serious physical injury under the statute." (Internal quotation marks omitted.) *State* v. *Almeda*, supra, 211 Conn. 450; accord *State* v. *Adams*, 327 Conn. 297, 304–305, 173 A.3d 943 (2017).

The evidence regarding Bran's injuries principally came from the testimony of her treating physician at the hospital and two sets of photographs of the injured area: one set taken shortly after medical treatment was rendered and the other set taken thirty months later, at the time of trial. Each set included one photograph magnifying the injuries at close range and one photograph in which Bran displayed the injured area of her arm, taken from a sufficient distance to capture the area from Bran's upper torso to her head. Bran's physician testified that the scar would remain in its present condition.

Bran testified that she was unaware that she had been cut until her son told her that she was bleeding. Her only testimony relating to the appearance of her injury was her agreement that the photographs taken after treatment accurately depicted her condition at that time and her estimation of the approximate size of the scar at the time of trial. No testimony was provided regarding the impact of the scar on her appearance. The state opted not to have Bran display her scar to the jury directly, presenting the contemporaneous photographs instead.

The evidence collectively established the following undisputed facts. Immediately following the incident, Bran had an approximately 1.38 inch (three and one-half centimeters) abrasion and an approximately 0.30 inch (three-quarters of one centimeter) laceration just above her left elbow. Just below her left elbow, on her forearm, Bran had an approximately 1.57 inch (four centimeter) laceration. The smaller laceration was

closed with a single suture; the larger laceration was closed with ten sutures. The closed lacerations appear quite narrow.[15] By the time of trial, the larger of the two lacerations had left a scar approximately the same length as the laceration, although it appears to be slightly wider in the magnified close-up than when sutured. The scar is a slightly lighter tone than the surrounding skin. No other injury is apparent.

Our application of the factors previously identified as relevant to assessing whether the victim has sustained a serious disfigurement establishes that Bran sustained a disfigurement, in the form of a permanent scar. That scar is in a location that could be seen if Bran wears anything shorter than a three-quarter sleeve top. The scar is not, however, in a prominent location such as her face or neck.[16] It is relatively small in size, uniform in shape (a straight line), and otherwise unremarkable in its general appearance. Although the scar is visible if one looks for it, in the photograph that appears to have been taken from a distance of normal social interaction, its appearance is not such that one's eye naturally would be drawn to it. Serious disfigurement requires something more than visibility, as it must be visible to mar one's appearance and, hence, meet the threshold for disfigurement. See *Akaran* v. *State*, supra, 2005 WL 1026992, *3 (noting that "courts agree that if a scar is observable from a normal social distance,

[15] The photograph magnifying the laceration at close range shows loose threads from bandages that were removed to reveal the wounds. The width of those threads appears to be roughly the same width as the laceration. No evidence was proffered regarding the depth of the lacerations or their appearance prior to suturing.

[16] We disagree with the Appellate Court's conclusion that the location of Bran's scar made it "no less observable than a facial scar." *State* v. *Petion*, supra, 172 Conn. App. 677. Other courts have recognized as much. See, e.g., *State* v. *Hughes*, supra, 469 S.W.3d 900 ("[v]isibility of scarring, *particularly on the face*, size of scars, and the presence of additional injuries are all factors in determining disfigurement" [emphasis added]).

it constitutes a disfigurement," and then considering whether scar is also serious disfigurement); *Thomas* v. *State*, 128 Md. App. 274, 303, 737 A.2d 622 ("[d]isfigurement is generally regarded as an externally *visible* blemish or scar that impairs one's appearance" [emphasis added]), cert. denied, 357 Md. 192, 742 A.2d 521 (1999).

This evidence compels the conclusion that the disfigurement is not of a magnitude that objectively could be found to *substantially* detract from Bran's appearance. We hold that the evidence is not legally sufficient to meet the threshold for serious disfigurement.

We note that, while no two cases are precisely the same, other jurisdictions considering a single scar of roughly similar size, location, and/or appearance as the one in the present case have concluded that the evidence did not rise to the level of serious disfigurement. See, e.g., *Vo* v. *State*, 612 So. 2d 1323, 1325 (Ala. App. 1992) (bullet wound through arm was not serious physical injury), cert. denied, Alabama Supreme Court, Docket No. 1920350 (February 19, 1993); *Davis* v. *State*, 467 So. 2d 265, 266–67 (Ala. App. 1985) (scars on victim's hand from bullet going through it was not serious disfigurement); *McDaniel* v. *Commonwealth*, 415 S.W.3d 643, 659 (Ky. 2013) (small scar on victim's wrist from bullet wound, barely visible in video, was not serious disfigurement, consistent with cases in which court previously held that scar from small stab wound was not serious disfigurement); *People* v. *Stewart*, 18 N.Y.3d 831, 832, 962 N.E.2d 764, 939 N.Y.S.2d 273 (2011) (six to seven centimeter [approximately two and one-half inch] wound on victim's inner forearm requiring sutures was not shown to be objectively distressing or objectionable so as to justify conclusion that it constituted serious disfigurement predicate for first degree assault); *People* v. *McKinnon*, supra, 15 N.Y.3d 316 (two scars of moderate size on victim's inner forearm were not serious disfigurement, in absence of evidence that there was

something unusually disturbing about scars); *Bueno* v. *State*, 996 S.W.2d 406, 408 (Tex. App. 1999) (two inch scar on abdomen was not sufficient to show serious, permanent disfigurement); *Hernandez* v. *State*, supra, 946 S.W.2d 113 (one inch scar on abdomen did not amount to serious, permanent disfigurement); *McCoy* v. *State*, 932 S.W.2d 720, 724 (Tex. App. 1996) (scar on victim's lip that was permanent but not visible unless individual looked for it was not sufficient to constitute serious, permanent disfigurement). But cf. *Sloan* v. *State*, supra, 2010 WL 4813600, *1–2 (five scars from stab wounds in left arm and shoulder were sufficient evidence of serious, permanent disfigurement); *Thomas* v. *State*, supra, 128 Md. App. 303 (court could not conclude that there was insufficient evidence of serious physical injury as result of bite wound on arm that left scar because court did not see scar and, therefore, could not say that reasonable jurors who did see it could not conclude that it was serious, permanent/protracted disfigurement); *State* v. *Williams*, 784 S.W.2d 309, 311 (Mo. App. 1990) (three inch laceration to victim's neck, described in hospital record as superficial, was held to constitute serious disfigurement due to keloid formation of scar tissue); *State* v. *Pettis*, 748 S.W.2d 793, 794 (Mo. App. 1988) (four inch scar on arm constituted serious disfigurement); *State* v. *Williams*, 740 S.W.2d 244, 246 (Mo. App. 1987) (five inch wound on neck with resulting hypertrophic, or elevated, scar was held to constitute serious disfigurement); *People* v. *Ahearn*, 88 App. Div. 2d 691, 692, 451 N.Y.S.2d 318 (1982) ("[i]t is reasonable to characterize the *extensive* permanent scar [on the victim's arm] as a 'serious and protracted disfigurement' " [emphasis added]).

These cases reflect that, even though no bright line can be drawn between simple disfigurement and serious disfigurement, the courts have a role in ensuring that the evidence meets a minimum threshold that distinguishes

the two. When reasonable minds could disagree as to the side of the line on which the injury falls, it would be improper for this court to act as a seventh juror and to substitute its own view for that of the jury. However, this is not such a case.

Although the state framed its disfigurement argument to the jury solely in reference to Bran's scar at the time of trial, it asserts in its brief to this court that the jury also was free to consider the appearance of Bran's injuries when inflicted, and properly could have rendered its verdict on that basis. We agree that, in assessing the seriousness of the disfigurement, the jury was not limited to considering the injury in its final, fully healed state. See, e.g., *State* v. *Barretta*, supra, 82 Conn. App. 686, 688–90 (contusions and severe bruising all over body from beating with baseball bat established serious disfigurement). But we are not persuaded that this perspective changes the outcome. The nature of the injury on Bran's arm at the time it was inflicted and at the time of the trial was not significantly different. The forearm laceration was appreciably more apparent immediately after the wound was sutured than after it healed, but it still retained the relatively undistinguishing features previously discussed.[17] Consequently, this evidence also was legally insufficient to support a finding of serious disfigurement.

We emphasize that, in concluding that the evidence was not legally sufficient to establish that the defendant

[17] The state did not produce evidence to establish how long the laceration remained in the condition reflected in the photographs or when the sutures were removed, a fact from which such an inference arguably might be drawn. Although the sutures undoubtedly make Bran's appearance less attractive than after they were removed, the state has not claimed that the jury could properly assess the seriousness of the injury on the basis of the treatment method selected by the victim's physician (e.g., closing a wound with glue, which would not be visible, versus with sutures or some other visible means). Our review of case law from other jurisdictions has not revealed any authority supporting that proposition.

caused Bran to suffer serious disfigurement, we do not intend to trivialize the assault or the physical legacy of it that remains with Bran. However, it is clear that the state failed to prove beyond a reasonable doubt that the defendant committed assault in the first degree by inflicting serious physical injury on Bran with a dangerous instrument. Therefore, the defendant's conviction of that charge must be reversed.

II

In light of this determination, we must consider the state's contention that we should not direct a judgment of acquittal on this charge but, instead, that the judgment should be modified to reflect the highest lesser included offense that requires only physical injury, not serious physical injury, i.e., assault in the second degree in violation of § 53a-60 (a) (2),[18] and the defendant should be resentenced accordingly. The state concedes that, under *State* v. *LaFleur*, supra, 307 Conn. 115, the judgment of conviction must be reversed. It contends, however, that we should reconsider this precedent—despite its relatively recent vintage—because its reasoning is unsound. The state asks us, instead, to overrule *LaFleur* in favor of a rule under which a conviction suffering from evidentiary insufficiency would be modified to the highest lesser included offense supported by the evidence, unless the defendant can prove that the absence of a jury instruction on that lesser included offense was prejudicial. The state contends that the fact that the jury was never charged on the lesser offense does not demonstrate such prejudice because, by finding that the evidence supported all the elements of the greater offense, the jury necessarily

[18] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

found that the evidence supported the elements of the lesser included offense. We decline to overrule *LaFleur*.

Our decision in *LaFleur* hewed closely to the analysis applied in *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009). That case involved an instructional error based on a posttrial change to our long-standing interpretation of the kidnapping statute under which the defendant was convicted. Id., 577–78, 595. In light of that error, this court considered the state's contention that, if it elected not to retry the defendant on the kidnapping charge, it would be entitled to a modification of the judgment to reflect the lesser included offense of unlawful restraint in the second degree. Id., 590. The court noted a split of authority in state and federal courts as to whether modification is proper if the jury had not been instructed on the lesser included offense, as was the case in *Sanseverino*. Id., 593. One group held that modification is never proper under those circumstances; the other group held that modification is proper as long as there is no prejudice to the defendant. Id., 593–94. This court concluded in *Sanseverino* that, "[u]nder the unique circumstances" of the case; id., 595; the judgment could be modified to reflect the lesser included offense because (1) there was no reason to believe that the state had opted against seeking a jury instruction on that lesser included offense for strategic purposes (because our precedent was so well settled), (2) the defendant had benefited from our holding in the case that had overruled precedent, even though he had not raised a claim challenging that precedent, (3) the defendant had not objected to the state's request for a modification of the judgment, and (4) we could conceive of no reason why it would be unfair to the defendant to impose a conviction of unlawful restraint in the second degree (given the preceding circumstances and the fact that the jury "*necessarily*" found the defendant guilty of the lesser

included offense by finding him guilty of the greater offense). (Emphasis in original.) Id., 595 and 596 n.17.

Three years later, in *LaFleur*, this court similarly was faced with the question of whether instructional error on an element of assault in the first degree required the conviction to be reversed or the judgment to be modified to the lesser included offense of assault in the second degree when the jury had not been instructed on that lesser offense. *State* v. *LaFleur*, supra, 307 Conn. 140–42. The instructional error in *LaFleur* stemmed from an issue of first impression, whether a fist is a "dangerous instrument." Id., 140. In a closely divided decision, this court concluded that modification was not appropriate. Id., 153–54; id., 164-85 (*Palmer*, *J.*, dissenting). The majority pointed to the split of authority on this issue that had been acknowledged in *Sanseverino*. Id., 142–43. It rejected the approach of the courts permitting modification in the absence of evidence of undue prejudice to the defendant because that approach did not give any weight to the fact that the jury had not been charged on the lesser included offense, and did not consider that the state may have had a strategic reason for not requesting the lesser charge. Id., 145–47. Ultimately, the majority in *LaFleur* looked to the circumstances that justified modification in *Sanseverino* and concluded that, because these circumstances were not present in *LaFleur*, the court could not conclude that it would be fair to the defendant to allow modification. Id., 147–51.

The majority cited several reasons why, in the absence of those unusual circumstances, a court should not modify a conviction when the state did not request a charge on the lesser included offense: "First, an appellate court does not sit as a [fact finder] in a criminal case and should avoid resolving cases in a manner [that] appears to place the appellate court in the jury box. . . .

"Second . . . this view preserves the important distinction between an appellate determination [that] the record contains sufficient evidence to support a guilty verdict and a jury determination [that] the [s]tate proved its case beyond a reasonable doubt. . . .

"Third, when [a jury instruction on the lesser offense has been given] . . . it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law . . . and . . . that the appellate court is simply passing on the sufficiency of the implied verdict. When, however, no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative. . . .

"Fourth, when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense. . . .

"Fifth, adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the [s]tate to avoid requesting or agreeing to submit a lesser included offense to the jury. . . .

"Sixth, the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an all or nothing approach at trial, but then on appeal, perhaps recognizing [that] the evidence will not support a conviction [of] the greater offense, is allowed to abandon its trial position and essentially concede [that] the lesser included offense should have been submitted to the jury. . . .

"Seventh . . . [t]he defendant may well have [forgone] a particular defense or strategy due to the trial

[court's] rejection of a lesser included offense." (Internal quotation marks omitted.) Id., 152 n.30, quoting *State* v. *Brown*, 360 S.C. 581, 594–97, 602 S.E.2d 392 (2004); see *State* v. *Brown*, supra, 594–97 (explaining why charge on lesser included offense is necessary prerequisite to modification).

The majority's analysis in *LaFleur* resulted in two notable clarifications of the *Sanseverino* factors. First, the majority effectively determined that it would presume that the state's failure to request an instruction on the lesser included offense was strategic unless the evidentiary deficiency resulted from an unforeseeable change in the law, not merely the resolution of an issue of first impression, such that the state could not have anticipated the change. Id., 147. Second, it effectively presumed that the absence of an instruction on the lesser included offense prejudiced the defendant: "Regardless of whether the defense challenged the state's claims as to elements of the lesser included charge, trial strategy and jury deliberations are *inevitably* colored by the inclusion of a lesser included charge to the jury." (Emphasis added.) Id., 151.

The dissent in *LaFleur* argued that the *Sanseverino* factors were never intended to apply as a general framework for assessing whether modification of the judgment is proper in the absence of a jury charge on the lesser included offense. Id., 166–67 (*Palmer*, *J.*, dissenting). It contended that, as a general matter, modification is not unfair to the defendant in such cases because the greater offense puts the defendant on notice of the lesser offense and a jury finding on the greater offense necessarily means that the jury finds the elements of the lesser offense satisfied. Id., 168, 173–74 (*Palmer*, *J.*, dissenting). The dissent contended that, unless the defendant can offer a legitimate reason why it would be unfair to sentence him to the lesser included offense, modification of the judgment achieves

the result most consonant with justice. Id., 166, 173–81 (*Palmer*, *J.*, dissenting). It criticized the majority for purporting to reject a bright line rule when, in reality, it had adopted one, asserting that the state will be unable to prove either that its failure to seek an instruction on the lesser included offense was not strategic or that the defendant would not have altered his trial strategy had such an instruction been given. Id., 173 (*Palmer*, *J.*, dissenting).

Having thus provided a comprehensive review of the precedent that the state seeks to overrule, we must consider whether the prudential doctrine of stare decisis counsels against that action. Stare decisis "counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417, 195 A.3d 664 (2018). "While stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification. . . . *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Such justifications include the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Internal quotation marks omitted.) *Sepega* v. *DeLaura*, 326 Conn. 788, 798–99 n.5, 167 A.3d 916 (2017). "When a prior decision is seen so clearly as error that its enforcement [is] for

that very reason doomed . . . the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision." (Citation omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 659, 680 A.2d 242 (1996). In making this determination, the court should consider whether the parties acted in reliance on the rule at issue. See *Spiotti* v. *Wolcott*, 326 Conn. 190, 202–203, 163 A.3d 46 (2017) ("a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants" [internal quotation marks omitted]).

We are not persuaded that the state has provided a sufficient justification for overruling *LaFleur*. The state's reasons mirror those made by the dissent in *LaFleur*, which did not carry the day. The state does not argue that the split among both federal and state courts on this issue has evolved to a greater consensus favoring modification. The very fact that reasonable jurists disagree on this matter suggests that *LaFleur* has not been proven "clearly" wrong.

Nor is there any evidence that the rule in *LaFleur* is unworkable. If the state wants to avoid the possibility that the evidence will be deemed insufficient to support the charge, whether by the jury or a reviewing court, it can simply request an instruction on any lesser included offense supported by the evidence. In fact, we agree with the dissent in *LaFleur* that the practical effect of the majority's analysis is a bright line rule.

Reliance interests also favor application of the holding in *LaFleur* to the present case. Both parties were on notice at trial that *LaFleur* was the controlling law. Knowing this, the state chose to gamble that the evidence would be found factually and legally sufficient to support a conviction of assault in the first degree as

to both victims, despite the obvious disparity in the seriousness of their injuries. It is fair to presume, under these circumstances, that the defendant believed that the evidence was insufficient to support a charge of assault in the first degree as to Bran and that, in the absence an instruction on a lesser included offense, either (a) the jury would find him not guilty; see *Fair* v. *Warden*, 211 Conn. 398, 404, 559 A.2d 1094 ("[i]t may be sound trial strategy not to request a lesser included offense instruction, hoping that the jury will simply return a not guilty verdict"), cert. denied, 493 U.S. 981, 110 S. Ct. 512, 107 L. Ed. 2d 514 (1989); or (b) his conviction would be vacated under *LaFleur*. It would be unfair to the defendant to change the law on appeal. Had he known that the judgment would be modified if he succeeded on his evidentiary sufficiency challenge, he might have sought an instruction not only on assault in the second degree, a class D felony, but also on assault in the third degree, a class A misdemeanor. See General Statutes §§ 53a-60 (a) (2) and (b) and 53a-61.[19] Under our law, the defendant would have been entitled to instructions all the way down to the lowest offense supported by the evidence. See, e.g., *State* v. *Vasquez*, 176 Conn. 239, 241, 244, 405 A.2d 662 (1978) (when information charged defendant with robbery in first degree, he was entitled to jury charge on robbery in second degree, robbery in third degree, and larceny in fourth degree on ground that those offenses are lesser included crimes of robbery in first degree). We conclude, therefore, that the state has not provided a substantial justification for departing from the holding in *LaFleur*.

[19] See footnote 18 of this opinion for the text of § 53a-60 (a) (2). General Statutes § 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon."

The state contends, however, that there is evidence here, unlike in *LaFleur*, to establish that the defendant was not prejudiced by the lack of an instruction on the lesser included offense of assault in the second degree. The state points to the fact that the defendant submitted proposed jury instructions on the first day of evidence that included a request to charge on assault in the second degree with respect to Bran but that he withdrew that request at the charging conference at the close of evidence.[20] Given this timing, the state claims that "the defendant put on his entire defense anticipating that a lesser charge would be given before withdrawing the request" and, therefore, could not have been prejudiced by the absence of the instruction. We disagree. The timing of the withdrawal does not necessarily correlate to the timing of the defendant's decision, as there was no need to inform the court of that decision prior to the charging conference. The defendant may have made that determination during or at the close of the state's case-in-chief, after it likely became apparent that the state's proof as to Bran fell short of the evidence needed for a conviction of assault in the first degree. Moreover, as previously noted, had the state sought an instruction on assault in the second degree at the charging conference, the defendant might have requested a charge on a still lesser offense.

We therefore conclude that the defendant's conviction of assault in the first degree as to Bran must be

[20] That request to charge was for an instruction under the subsection requiring that "the actor *recklessly* causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument"; (emphasis added) General Statutes § 53a-60 (a) (3); whereas the state seeks to modify the judgment to reflect a conviction under the subsection requiring that, "with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ." General Statutes § 53a-60 (a) (2). The former is a class C felony because it requires serious physical injury, whereas the latter is a class D felony. See General Statutes § 53a-60 (b).

reversed. In light of this determination, one further observation is warranted. "This court has endorsed the . . . aggregate package theory of sentencing. . . . Pursuant to that theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact. . . . Thus, we must remand this case for resentencing on the sole [count] on which the defendant stands convicted." (Citation omitted; internal quotation marks omitted.) *State* v. *LaFleur*, supra, 307 Conn. 164.

The judgment of the Appellate Court is reversed only with respect to the conviction of assault in the first degree as to Bran and the case is remanded to that court with direction to remand the case to the trial court with direction to render judgment of acquittal on that charge, to vacate the defendant's sentence, and to resentence him on the remaining charge; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion KAHN and ECKER, Js., concurred.

PALMER, J., concurring in the judgment. I agree with and join part I of the majority opinion,[1] in which the majority concludes that there was insufficient evidence of serious physical injury to support the conviction of the defendant, Divenson Petion, on one of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Although I concur in the judgment, I do not join part II of the majority opinion, in

[1] Although I agree with and join part I of Justice McDonald's opinion, and concur in the judgment, for reasons stated hereinafter, I do not join part II of Justice McDonald's opinion. Therefore, that opinion, in which Justices Kahn and Ecker join, is technically not a majority opinion but, rather, an opinion announcing the judgment of the majority of this court. In the interest of simplicity, however, I refer to that opinion as the majority opinion.

which the majority rejects the state's request to modify the judgment of conviction to reflect the defendant's conviction of the lesser included offense of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) in light of this court's reversal of the defendant's conviction of first degree assault on the basis of evidentiary insufficiency.

I continue to maintain my view that *State* v. *LaFleur*, 307 Conn. 115, 151–54, 51 A.3d 1048 (2012), in which this court effectively adopted a bright line rule requiring that a conviction be vacated under the present circumstances, was wrongly decided. See id., 164–66 (*Palmer*, *J.*, dissenting). As I explained in my dissenting opinion in *LaFleur*, the majority in that case employed a flawed analysis that failed to account for the fact that the categorical rule it adopted—albeit while claiming to adopt a fairness based, case-by-case approach, a claim that, as the majority in the present case candidly acknowledges, is groundless—penalizes the state for failing to request a charge on the lesser included offense, even though the defendant himself had the absolute right to seek and obtain such an instruction, and irrespective of whether the defendant suffered any prejudice as a result of that omission. Id., 181–85 (*Palmer*, *J.*, dissenting). In so doing, the rule "bestows a windfall on the wholly undeserving defendant—and does so at the expense of the victim of the assault, the state and the general public—without any countervailing public benefit." Id., 165 (*Palmer*, *J.*, dissenting).

That having been said, *LaFleur* was the governing law at the time of trial in the present case, and the defendant was entitled to rely on that law when he opted against seeking a lesser included offense instruction. Therefore, even if I would favor overruling *LaFleur*, I would do so prospectively only. Accordingly, I agree that the defendant's conviction on one of two of the first

degree assault counts should be reversed and concur in the judgment.

MULLINS, J., with whom ROBINSON, C. J., and D'AURIA, Js., join, dissenting. I agree with much of the well reasoned analysis set forth in today's decision. In particular, I agree with the definitions that it articulates and the factors that it identifies as relevant to assessing whether a disfigurement rises to the level of "serious disfigurement." General Statutes § 53a-3 (4). Certainly, this area was in need of clarification, which this court now has provided. I do not agree, however, that, under the clarification provided today, no reasonable juror could find that the injury the defendant, Divenson Petion, inflicted on the victim, Rosa Bran, rose to the level of serious disfigurement. The source of my disagreement stems from the fact that the question of whether this injury constituted a serious disfigurement is a quintessential jury question. Under the facts of the present case, I cannot conclude that, as a matter of law, no reasonable juror could find that Bran's principal injury, namely the larger cut that required ten stitches to close and left a one and one-half inch permanent scar on her forearm, rose to the level of serious disfigurement.

Indeed, although I might not view Bran's injury as one that substantially detracts from her appearance, I cannot conclude that no reasonable juror could conclude otherwise. The injury is permanent, of a sufficient size, and in a sufficiently visible location that others might view it as a significant cosmetic deformity. I do not intend to suggest that this court has no role in reviewing such findings. A disfigurement that is not permanent, or one that is permanent but far less visible, might clearly fail to meet the threshold. That is not the present case. Thus, I would conclude that the evidence presented in this case was sufficient for a reasonable

juror to determine that Bran's injury "is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer." Accordingly, I would affirm the judgment of the Appellate Court.

Finally, because I believe the defendant's conviction should be upheld, I need not reach the issue of whether this court should overrule *State* v. *LaFleur*, 307 Conn. 115, 51 A.3d 1048 (2012). For the foregoing reasons, I respectfully dissent.

ORDERS

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IN RE NATALIA M.

The petition by the respondent father for certification to appeal from the Appellate Court, 190 Conn. App. 583 (AC 42512), is denied.

David J. Reich, in support of the petition.

Seon A. Bagot, assistant attorney general, in opposition.

Decided July 3, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 191

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JEAN-PIERRE BOLAT *v.* YUMI S. BOLAT
(AC 40767)

Lavine, Elgo and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court resolving certain postjudgment motions. Following the dissolution of their marriage, the parties entered into a stipulation governing various parenting matters and child support, which was approved by and made an order of the court. On appeal, the plaintiff claimed that the trial court improperly granted certain motions for contempt filed by the defendant, denied his motion for contempt, and denied his motion to modify his child support obligation. *Held*:

1. The trial court did not abuse its discretion when it granted the defendant's May, 2017 motion for contempt and held the plaintiff in contempt for violating the stipulation by failing to make arrangements for the parties' minor children when he could not be with them during his scheduled parenting time as the "custodial parent": although "custodial parent" was not defined in the stipulation, the relevant paragraph, when read within the context of the other provisions, made it clear that it refered to the parent who was meant to have the children at a given time according to the stipulation, and, thus, the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt; moreover, the trial court reasonably could have found that the plaintiff had wilfully violated the stipulation, as a review of the canvass that occurred before the court accepted the parties' stipulation and made it an order plainly indicated that the plaintiff attributed the same meaning to the term "custodial parent" as the defendant, and demonstrated that the plaintiff knew he had to make alternate arrangements for the children during his parenting time if he was unavailable.
2. This court declined to review the plaintiff's claim that the trial court improperly denied his September, 2017 motion for contempt, as that claim was inadequately briefed, the plaintiff having failed to provide any analysis or to demonstrate, aside from unsupported assertions, how the court's ruling that his motion was barred by the doctrine of res judicata was improper.
3. The trial court did not abuse its discretion when it granted the defendant's August, 2017 motion for contempt and found the plaintiff in contempt for violating the stipulation by failing to contribute toward the purchase of a vehicle for the parties' children: the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt, as although the plaintiff correctly pointed out that the stipulation did not specify who would purchase the vehicle or when it would be purchased, he failed to explain or provide any legal authority to show that the absence of such details made the stipulation ambiguous, and this court could not conclude that the language of the stipulation was reasonably susceptible to more than one interpretation; moreover, the trial court reasonably could have found that the plaintiff had wilfully violated the stipulation, as the plaintiff's claims that he had offered two free vehicles, that he was not timely given the proof of purchase that he had asked for, and that the defendant acted unilaterally despite the stipulation provision that provided that the plaintiff had final decision-making authority, did not demonstrate how his failure to contribute the sum that he had contractually agreed to provide was not wilful, and the court's conclusions were supported by the evidence.
4. The trial court did not abuse its discretion in denying the plaintiff's motion to modify his child support obligation due to a substantial change in circumstances; the plaintiff bore the burden of persuading the court that his circumstances had changed substantially, and although the

plaintiff introduced testimony and documentary evidence to show that his income had declined since the parties entered into the stipulation, the court, as the fact finder, was free to discredit his testimony, and in the absence of any credible evidence that the plaintiff's income had declined, the court reasonably could have found that the plaintiff had failed to prove a substantial change in his circumstances.

Argued March 13—officially released July 23, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shluger, J.*, granted the defendant's motion for contempt; subsequently, the court, *Klatt, J.*, denied the plaintiff's motion for contempt; thereafter, the court, *Klatt, J.*, granted the defendant's motion for contempt; subsequently, the court, *Klatt, J.*, denied the plaintiff's motion to modify child support, and the plaintiff appealed to this court; thereafter, the court, *Klatt, J.*, granted the plaintiff's motion for articulation. *Affirmed.*

Jean-Pierre Bolat, self-represented, the appellant (plaintiff).

Richard W. Callahan, for the appellee (defendant).

Opinion

ELGO, J. In this contentious postdissolution case, the self-represented plaintiff, Jean-Pierre Bolat, appeals from various postdissolution judgments rendered by the trial court in favor of the defendant, Yumi S. Bolat. On appeal, the plaintiff claims that the court improperly (1) granted the defendant's May 9, 2017 motion for contempt, denied his September 19, 2017 motion for contempt, and granted the defendant's August 23, 2017 motion for contempt; and (2) denied his motion to modify his child support obligation. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved

on June 21, 2011. They have three children together. On April 11, 2017, the parties entered into a stipulation governing various parenting matters and child support, which was approved by and made an order of the court (stipulation). Pursuant to the stipulation, the parties shared joint legal custody, and the children primarily resided with the defendant. It also provided for the two elder children to use the plaintiff's residence in Wallingford as their residence for school purposes and to finish high school at Sheehan High School in Wallingford. The stipulation further provided that "the [plaintiff] shall have parenting time to include every other weekend from Friday after school until Monday when school commences or [9 a.m.]." It also stated that "[i]f the custodial parent cannot be with the children, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children."

Subsequent to entering into the stipulation, both parties filed various motions with the court. On August 8, 2017, the court granted the defendant's May 9, 2017 motion for contempt and found the plaintiff in contempt for failing to make arrangements for the children when he could not take them during his scheduled parenting time. On October 4, 2017, the court denied the plaintiff's September 19, 2017 motion for contempt when it determined that the issues raised by the plaintiff's motion were barred by the doctrine of res judicata. On October 19, 2017, the court granted the defendant's August 23, 2017 motion for contempt and found the plaintiff in contempt for failing to pay $3000 toward the purchase of a vehicle for their children. On November 21, 2017, the court denied the plaintiff's July 31, 2017 motion to modify his child support obligation, concluding that the plaintiff had "failed to meet his burden of showing a significant change in his financial circumstances . . . ." From these judgments the plaintiff now appeals.

I

CONTEMPT CLAIMS

The plaintiff first claims that the court improperly (1) granted the defendant's May 9, 2017 motion for contempt, (2) denied his September 19, 2017 motion for contempt, and (3) granted the defendant's August 23, 2017 motion for contempt. We disagree.

We begin by setting forth our standard of review and relevant legal principles. "[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693–94, 935 A.2d 1021 (2007).

"Civil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . Whether an order is sufficiently clear and unambiguous is a necessary prerequisite for a finding of contempt because [t]he contempt remedy is particularly harsh . . . and may be founded solely upon some clear and express direction of the court. . . . One cannot be placed in contempt for failure to read the court's mind. . . . It is also logically sound that a person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what

is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 695.

The order at issue is the stipulation, entered into by the parties, which was made an order of the court. "In domestic relations cases, [a] judgment rendered in accordance with . . . a stipulation of the parties is to be regarded and construed as a contract. . . . It is well established that [a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . In contrast, an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation. . . . Nevertheless, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Citations omitted; internal quotation marks omitted.) *Mettler* v. *Mettler*, 165 Conn. App. 829, 836–37, 140 A.3d 370 (2016).

A

The plaintiff claims that the court improperly granted the defendant's May 9, 2017 motion for contempt when it held him in contempt for violating the stipulation by failing to make arrangements for the children when he could not be with them during his scheduled parenting time. Specifically, the plaintiff argues that the court's holding was improper because the stipulation is ambiguous and there was no evidence that his violation was wilful. We disagree.

The following facts and procedural history are relevant to this claim on appeal. Before approving the stipulation and making it an order, the court canvassed the parties about what they meant in paragraph 4.2, which states: "If the custodial parent cannot be with the children, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children." The court stated: "So, when I read this paragraph, I read [it] to be [that] if the custodial parent cannot be with the children—let's say . . . the custodial parent is going to be absent for one night or however many nights, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children. If the noncustodial parent agrees to take the children, that's terrific. . . . [I]f [the plaintiff] is traveling and [the defendant] says of course they can stay overnight and that's acceptable, I have no problem with that . . . and likewise, on the other side, if that is not an option, the children must stay with an adult. The custodial parent's responsibility is to find an adult to take care of those kids."

Additionally, the following colloquy occurred between the court and the plaintiff about paragraph 4.2:

"The Court: I think that given the context, if you and your wife want to take an overnight somewhere and it

would be your night to have the kids, you know, I'm sure [the defendant] would take them. If they're not about to do that, you've got to find—

"[The Plaintiff]: Right.

"The Court: And vice versa.

"[The Plaintiff]: Mm-hmm.

"The Court: Okay.

"[The Plaintiff]: Yes, Your Honor."

On May 1, 2017, the plaintiff filed a motion for articulation in which he asked the court to articulate several paragraphs of the stipulation, including paragraph 4.2. In that motion, he argued that "there appears to be a discrepancy in [the] definition of custody, parenting time, visitation, responsibilities of the parties, and agreements made during negotiations. Said agreements that were made during settlement discussions and during the court hearing are now confused." The court denied that motion on May 3, 2017. On that same date, the plaintiff filed a motion to open and modify the stipulation, arguing that the "disingenuous and deceitful nature of the defendant and her attorney during the settlement discussions" necessitated that the stipulation be opened and modified. On May 9, 2017, the defendant filed a motion alleging that the plaintiff violated terms in the parties' stipulation and that he was therefore in contempt of the court's order. Specifically, she asserted that the plaintiff wilfully violated terms in the parties' stipulation when he "refused to take the children, and further refused to make arrangements for the children when he learned that the defendant and her husband had alternate plans." On May 25, 2017, the plaintiff filed an objection to that motion in which he argued that he had not "wilfully violated any clear and unambiguous order of the court."

A hearing on the defendant's motion for contempt and the plaintiff's motion to open and modify the stipulation was held on July 31, 2017. In its August 8, 2017 memorandum of decision, the court determined that, because "the term 'custodial parent' was never defined in the agreement, [the court] must determine its meaning based on the intent of the parties. The [c]ourt [found] that the canvass makes crystal clear that the parties intended paragraph 4.2 to apply to both parents and that if either parent was unable to care for the children during 'their assigned time,' they must make alternative arrangements." The court concluded that the colloquy between the plaintiff and the court that occurred during the canvass "makes clear that the parties intended paragraph 4.2 to apply to both parents and when they used the phrase 'custodial parent' they intended it to mean 'the parent with custody of the children at that time.' " The court, therefore, found by clear and convincing evidence that the plaintiff was in contempt. At the same time, the court concluded that it had not been "presented with sufficient evidence upon which to fashion a sanction. The [c]ourt did not receive evidence as to exact dates or any monetary costs which the [d]efendant was forced to incur as a result of having to care for the children during the [plaintiff's] parenting time." For that reason, the court did not impose a sanction against the plaintiff.

On appeal, the plaintiff argues that he is not the custodial parent and, therefore, paragraph 4.2 does not apply to him. As such, he contends that the court improperly found him in contempt for violating that provision. We disagree.

Although "custodial parent" is not defined in the stipulation, paragraph 4.2, when read within the context of the other provisions, makes clear that "custodial parent" refers to the parent who is meant to have the children at a given time according to the stipulation.

See *Isham* v. *Isham*, 292 Conn. 170, 184, 972 A.2d 228 (2009) (construing term in agreement in context of other provisions). The stipulation provides that the parties share joint legal custody. It further provides that the minor children primarily shall reside with the mother, but also that the father shall have parenting time every other weekend. In light of the fact that the parties had a shared custody arrangement that included scheduled parenting time with the father, the sensible and ordinary meaning of "custodial parent" is the parent scheduled to have physical custody of the children at a given time according to the terms of the stipulation.[1] In the context of the custody arrangement agreed on by the parties, the intent of the parties, "ascertained by a fair and reasonable construction of the written words"; (internal quotation marks omitted) *Mettler* v. *Mettler*, supra, 165 Conn. App. 836; was for the provision to apply to both the plaintiff and the defendant. "Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015). Accordingly, we conclude that the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt.

The plaintiff also argues that the court incorrectly determined that he wilfully violated the stipulation because his actions in requesting an articulation and a modification of the stipulation show that there was "a good faith misunderstanding of the definitions of the

[1] The plaintiff also asserts that it is impossible for him to be in contempt under this definition because, at the time of the alleged contempt, he "was forty miles away at a meeting." What we understand the plaintiff to mean is that custody is triggered when a party actually receives physical custody of the children. That interpretation, however, obviates the terms of the stipulation because the obligation to make other arrangements for the children would never attach for either parent during his or her scheduled parenting time.

terms used and of the overall intent of the parties."[2] In response, the defendant contends that the canvass of the parties clearly indicates that the plaintiff knew that the paragraph applied to him. We agree with the defendant.

Our review of the canvass that occurred on April 11, 2017, prior to the court accepting the parties' stipulation and making it an order, plainly indicates that the plaintiff attributed the same meaning to the term "custodial parent" as the defendant. It further establishes that the plaintiff knew he had to make alternate arrangements for the children during his parenting time if he was unavailable.

Moreover, to the extent the plaintiff argues that the court's decision to grant his motion for modification and modify paragraph 2.2, which pertains to visitation, makes the court's contempt judgment improper, we disagree. While we acknowledge that the court, on August 8, 2017, granted the plaintiff's motion to open and modify the stipulation,[3] those new terms are irrelevant as to whether the plaintiff was in contempt of the prior order. Our Supreme Court consistently has held that "[a]n order of the court must be obeyed *until* it has been modified or successfully challenged." (Emphasis added; internal quotation marks omitted.) *Sablosky* v.

[2] The plaintiff also asserts that "[i]n order to find [him] in wilful contempt, the trial court was required to find that the defendant proved, by clear and convincing evidence, that the plaintiff was required and mandated by law or case law to exercise his visitation rights." In so doing, the plaintiff fails to recognize that he was found in contempt for failing to make arrangements for the children during his scheduled parenting time when he realized he could not exercise that time. He was not found in contempt for simply failing to visit his children.

[3] In its August 8, 2017 memorandum of decision, the court ordered "that the [plaintiff's] parenting time will be every other weekend and additional time as agreed upon if and only if both children and the father wish to have that visitation occur. There shall be no penalty or sanction if he fails to exercise said access."

Sablosky, 258 Conn. 713, 719, 784 A.2d 890 (2001). Accordingly, the timing in which the plaintiff filed his motions for articulation and modification and the defendant filed her motion for contempt is immaterial. In finding the plaintiff in contempt, the court properly considered the plaintiff's actions that took place *before* paragraph 2.2 was modified.

Because the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt and the court reasonably could have found that the plaintiff had wilfully violated the stipulation, the court did not abuse its discretion in granting the defendant's motion for contempt. The August 8, 2017 judgment of contempt is affirmed.

B

The plaintiff next claims the court improperly denied his September 19, 2017 motion for contempt when it concluded that the issues raised by his motion were barred by the doctrine of res judicata. We conclude that the plaintiff's claim is inadequately briefed, and we, therefore, decline to review it.

"It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement

of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163–64, 20 A.3d 702 (2011).

We have carefully reviewed the plaintiff's appellate briefs. The plaintiff has failed to demonstrate, aside from unsupported assertions, how the court's ruling that his motion was barred by the doctrine of res judicata was improper. The plaintiff merely quotes the claim raised in another case and states that the court in this case abused its discretion "[i]n the exact same way" without providing any analysis.[4] Moreover, in his appellate reply brief, the plaintiff responds to the defendant's argument that there is an inadequate record for our review by arguing why the court should have found the defendant in contempt instead of explaining why the court improperly determined that the doctrine of res judicata barred his motion. For the foregoing reasons, we decline to review the plaintiff's claim.

C

The plaintiff also claims that the court improperly granted the defendant's August 23, 2017 motion for contempt when it held him in contempt for violating the stipulation by failing to contribute $3000 toward the purchase of a vehicle for their children. Specifically, the plaintiff argues that the court's finding was improper because the stipulation is ambiguous and his violation was not wilful. We disagree.

The following additional facts and procedural history are relevant to this claim. On August 23, 2017, the defendant filed a motion for contempt that alleged that the

[4] Specifically, the plaintiff cites to *Brochard* v. *Brochard*, 165 Conn. App. 626, 637, 140 A.3d 254 (2016), and quotes the following: "The defendant claims that Judge Gould abused his discretion when he determined that the authorization issue raised by the defendant's motion for contempt was already decided, and when he purported to decide the issue in his September 28, 2015 memorandum of decision. We agree."

plaintiff violated paragraph 5.1 of the stipulation, which provides in relevant part: "The parties shall share 50/50 in the purchase of a motor vehicle at $6000. Until the youngest child graduates high school, the vehicle shall be placed into the name of the [defendant], and the parties shall share 50/50 all costs related to the motor vehicle except gas, which shall be paid by the [defendant]."

On October 19, 2017, the third day of the hearing before the court on this motion, the court ruled from the bench. The court found, amongst other things, that "[w]hile there was no time limit in place, there was testimony that the defendant had to take action regarding the children within a reasonable time so that they could attend school. [The] [d]efendant did take action in a timely manner. By April 27, 2017, she had added [the eldest child] to her insurance policy. By May 11, 2017, she had . . . made arrangements to purchase the vehicle and the purchase was finalized in . . . July, 2017.

"There appear[s] to be limited discussion between the parties regarding the purchase of a specific vehicle. Evidence did establish that the defendant communicated almost immediately her intention to give her current vehicle to the children and obtain another vehicle for herself to the plaintiff. [The] [d]efendant purchased the vehicle she was currently leasing, a 2014 Jeep Patriot, at a purchase price of $14,000 and has indicated that this is the vehicle that the minor child will be driving. Testimony also established that the defendant requested the plaintiff reimburse her only $3000 towards the cost of the vehicle. The defendant also paid $160 to register the motor vehicle.

"Evidence further established that the plaintiff originally agreed to pay the defendant the $3000 with the

understanding that that amount would be his only financial contribution towards the purchase. Then his concern became . . . whether the Jeep would be used by other members of the defendant's family. After the defendant provided [the] plaintiff with additional information, [the] plaintiff still did not pay his share according to the agreement. After several e-mails between the parties or their spouses, [the] plaintiff simply refused to pay.

"Evidence offered by the plaintiff that the reason he did not pay the $3000 [was] because the defendant did not provide him with the information he requested regarding the Jeep or her own vehicle is not relevant . . . to his argument that he did not wilfully violate this order. . . . [The plaintiff] placed requirements on the defendant to provide information such as proof of purchase for the Jeep and the vehicle for herself, information that was not required by the agreement. [The] [p]laintiff cannot claim that his obligation is relieved because of his arbitrary demands, nor can [the] plaintiff raise any good faith claim that the steps taken by the defendant were not in accordance with the agreement. As the defendant was not asking him to contribute any more than [the] $3000 that the agreement required, the plaintiff had no justification to demand any additional information. His obligation regarding the purchase of the vehicle would have been completed with a simple payment.

"[The] [p]laintiff's suggestion, and it was nothing more than that, that the children could use . . . one of his grandfather's vehicles that he had inherited as of June, 2017, was proposed only after the defendant had begun the purchase agreement for the Jeep. . . .

"[The] [p]laintiff further suggests that [the] defendant had some kind of ulterior motive for the purchase of the Jeep. This court does not credit this testimony. The

fact that the defendant rather quickly chose to purchase a vehicle that was known to her, was known to be reliable and safe, bears no negative implications." The court also found that "[t]here was no testimony regarding the plaintiff's inability to pay."

Accordingly, the court found that the order was clear and unambiguous and that the plaintiff wilfully refused to comply with the order. The court therefore ordered the plaintiff to pay the $3000 toward the purchase of the vehicle.[5]

On appeal, the plaintiff contends that paragraph 5.1 of the stipulation "seems straightforward" but that it lacks key details, which makes it ambiguous. We disagree.

Although the plaintiff correctly points out that the stipulation did not specify who would purchase the vehicle or when it would be purchased, the plaintiff fails to explain or provide any legal authority to show that the absence of such details makes the stipulation ambiguous. "A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Mettler* v. *Mettler*, supra, 165 Conn. App. 836–37. We simply cannot conclude that the language of paragraph 5.1 that

[5] The court also awarded the defendant $1799.50 and an additional hour's worth of court time in attorney's fees to cover the cost of defending against the plaintiff's contempt motion. The court further concluded "that the actions and behavior of the [plaintiff] throughout this entire process requiring the defendant to have to go to court to get some type of contribution, particularly [the] actions and behaviors of the [plaintiff] throughout the pendency [of this action], are what indicate to this court that an award of attorney's fees . . . is appropriate. We are not here because of an appropriate debate. We are here because [the] plaintiff deliberately attempted to obfuscate issues to avoid what was his . . . own agreement and his obligation to pay."

"[t]he parties shall share 50/50 in the purchase of a motor vehicle at $6000" is "reasonably susceptible to more than one interpretation." Id., 837. Accordingly, we conclude that the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt.

The plaintiff also contends that the court improperly found that he wilfully had violated the stipulation provision. He argues that his violation of the provision was not wilful because he had offered two free vehicles, he was not timely given the proof of purchase that he had asked for, and the defendant acted unilaterally despite the stipulation provision that provides that he shall have final decision-making authority. We disagree.

The plaintiff's excuses do not demonstrate how his failure to contribute the $3000 that he contractually agreed to provide was not wilful. Further, to the extent the plaintiff argues that the court's "decision is erroneous and not substantiated by any evidence," on the basis of our review of the record, we conclude that the court's conclusions are supported by the evidence.

Because the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt and the court reasonably could have found that the plaintiff had wilfully violated the stipulation, the court did not abuse its discretion in granting the defendant's motion for contempt. The October 19, 2017 judgment of contempt is affirmed.

II

MOTION FOR MODIFICATION CLAIM

The plaintiff next claims that the court improperly denied his motion to modify his child support obligation due to a substantial change in circumstances. Specifically, he argues that a substantial change in circumstances had occurred on the basis of his "nearly . . . 50 [percent] reduction" in gross income.[6] We disagree.

[6] We note that within his appellate reply brief, the plaintiff replies to the defendant's arguments on earning capacity and attacks the court's judgment

The following additional facts and procedural history are relevant to this claim. Pursuant to the parties' April 11, 2017 stipulation, the plaintiff agreed to pay the defendant $375 per week in child support. The plaintiff filed a motion for modification on July 31, 2017, in which he sought to modify his child support obligation on the basis of a substantial change in circumstances, namely, because he lost his primary source of income on June 30, 2017.

A hearing was held on the plaintiff's motion for modification on October 17, 2017. In its November 21, 2017 memorandum of decision, the court found that the "[p]laintiff testified that he was laid off from his primary source of income as a consultant with Sovereign Intelligence, LLC, and that his private consultant firm [(the Bolat Group, LLC)] was operating at a net loss. [The] [p]laintiff testified that he had been employed by Sovereign Intelligence, [LLC] at a salary of $50,000 per year and had been laid off as of June 30, 2017. He further claimed that the contracts for [the Bolat Group, LLC]

in various ways that do not appear in his principal appellate brief. Amongst these new contentions raised for the first time in his reply brief, the plaintiff asserts that the court "completely disregarded" certain testimony and evidence, "misunderstood key elements of [his] testimony and evidence," made "factually erroneous" assertions, and "fabricate[d] conclusions." The plaintiff further asserts that the court's "erroneous conclusions were not based on expert analysis of the evidence, and the [c]ourt's hostility and bias are evident." The plaintiff's contentions are wholly unfounded. To the extent that the plaintiff argues that the court made erroneous factual findings, on the basis of our review of the record we cannot conclude that the court's findings were clearly erroneous. To the extent that the plaintiff argues that the court disregarded certain testimony and evidence, it is well founded that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 11, 164 A.3d 787, cert. denied, 327 Conn 929, 171 A.3d 455 (2017). Moreover, not only did the court not display hostility or bias toward the plaintiff, but our review of the transcript shows that, if anything, the court was accommodating of the plaintiff as a self-represented party.

had decreased and he was left with a net operating loss of $29,147."

The court found that only the first two exhibits offered by the plaintiff were relevant to his change in financial circumstances. The plaintiff's first exhibit was an "internet printout entitled 'Termination Detail Report' . . . prepared by the TriNet company . . . ." The court found that although that exhibit specified that he was laid off due to company reorganization, "[t]he report nonetheless fell short of being reliable evidence, as it appears it was not a document from Sovereign Intelligence itself, nor was there testimony explaining the exhibit and what it purported to detail. There was not sufficient reliable evidence for the court to determine what actual changes had been made in the plaintiff's compensation or that no income could be assigned as compensation to the plaintiff."

The plaintiff's second exhibit was a document prepared by the plaintiff listing the profit and losses of the Bolat Group, LLC. "[The] [p]laintiff claimed [that] the [the Bolat Group, LLC] had only gross income of $21,900 from January to October, 2017, and the 'expenses' of running the business put the company in the red for $29,147.[7] As Bolat Group LLC, prospective clients hired the plaintiff to consult on different financial and computer related matters. [The] [p]laintiff testified that the contracts to hire him had simply 'dried up' and there

[7] The court also explained that the "defendant challenged [the] plaintiff's claims regarding the loss of income for the Bolat Group, LLC. [The] [d]efendant offered [the] plaintiff's personal tax returns for 2015 and 2016, including the U.S. Return of Partnership Income for the Bolat Group, LLC, for both years. The 2015 return showed [that] the Bolat Group, [LLC] earned $163,290 in gross income with ordinary business income of $74,958. The 2016 return reports gross income of $147,715 and ordinary business income of $90,545." The court found that "[o]ther than [the] plaintiff's assertions that the income no longer exists, there was no offer of documentation to substantiate his claims." Accordingly, the court found "it difficult to accept as true that this level of income simply disappeared in this short time frame."

were no new clients. If true, then logically there would be no explanation or need for travel expenses of $4761, office expenses of $3170, maintenance expenses of $6202, and subcontractor expenses of $8250 as claimed in his profit and loss [in the plaintiff's second exhibit]." (Footnote added.) The court found that the plaintiff's second exhibit was "lacking in credibility in that it was not documented by any means but [the] plaintiff's preparation of the document for court proceedings."

The court also noted that "[t]he plaintiff has demonstrated a concerted effort to move assets into his current wife's name. He admitted that he had transferred 49 percent ownership of the Bolat Group, LLC, to his wife. Testimony established [that] the subcontractor expense for $8250 listed on the [plaintiff's second exhibit] was actually moneys paid to the wife. [The] [p]laintiff used his father's address (59 Jodi [Drive], Wallingford) as the primary location of the business. When [the] plaintiff's father passed away on June 8, 2017, [the plaintiff] quit-claimed the property to his current wife on June 10, 2017. While he indicated that he spent about [fifty] hours per week on the business and the wife ten hours per week, she was paid [two and one-half] times the amount of compensation he received."

The court found as to the plaintiff's financial affidavits that he "ha[d] not listed any home as an asset on the financial affidavits filed with the court since 2015. Yet, his 2015 and 2016 tax returns record home mortgage interest deductions. It would appear that many of the expenses deducted as business expenses, thereby reducing income, were also listed on the financial affidavits as expenses."[8]

[8] The court also found that "[f]inancial records offered as exhibits did not indicate that [the] plaintiff has made any lifestyle changes in his expenses. He has not reduced his weekly ordinary expenses, and continues to meet all his financial obligations. The plaintiff had taken little action to seek new employment; he appears to have applied for a few positions for which he was not qualified."

Moreover, "[t]he court found many inconsistencies in [the] plaintiff's testimony and [found] that the actions taken by [the] plaintiff were frankly not reasonable and logical if his financial assertions were true. There simply was not sufficient credible testimony and evidence regarding [the] plaintiff's claim of loss of income. [The] [p]laintiff . . . failed to meet his burden of proof proving a substantial change in financial circumstances." Accordingly, the court denied the plaintiff's motion for modification.

We begin by noting that "[t]he well settled standard of review in domestic relations cases is that [appellate courts] will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

General Statutes § 46b-86[9] governs the modification of a child support order after the date of a dissolution judgment. "When presented with a motion to modify

[9] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a."

child support orders on the basis of a substantial change in circumstances, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . . A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in circumstances of either party that makes the continuation of the prior order unfair and improper." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 639, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

Furthermore, "[t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In pursuit of its fact-finding function, [i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Citation omitted; internal quotation marks omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 328–29, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

The plaintiff bore the burden of persuading the court that his circumstances had changed substantially. See id., 328 ("[t]he party seeking modification bears the burden of showing the existence of a substantial change in the circumstances" [internal quotation marks omitted]). As the court relayed in its memorandum of decision, the plaintiff introduced testimony and documentary evidence to show that his income had declined since the parties entered into the stipulation. The court, as the fact finder, was free to discredit his testimony. In the absence of any credible evidence that the plaintiff's income had declined, the court reasonably could have found that the plaintiff had failed to prove a substantial change in his circumstances. Accordingly, the court did not abuse its discretion in denying the plaintiff's motion.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EMMIT SCOTT
(AC 38035)

DiPentima, C. J., and Alvord and Moll, Js.

Syllabus

Convicted of the crime of robbery in the first degree in connection with his alleged conduct in robbing the victims, G and R, of money and cell phones, the defendant appealed to this court, claiming, inter alia, that the trial court deprived him of his federal and state rights to due process when it denied his motion to suppress R's out-of-court and subsequent in-court identifications of him. The defendant and an accomplice, H, had approached G and R in the early morning hours while they were in G's car in the driveway of R's home. The defendant went to the front passenger side of the vehicle and, at gunpoint, demanded money and drugs, struck R with the gun, forced him to get out of the car, and took money and his cell phone from him. The defendant and H then searched the car and took G's cell phone and cash from the vehicle. H fatally shot G as the defendant and H left the scene. The police later learned that the defendant and H were to be arraigned in court on unrelated charges. L, an inspector with the state's attorney's office, accompanied R to the courthouse, where R watched the arraignment proceeding and thereafter identified the defendant and H as the assailants. H thereafter

was convicted of several crimes after he was tried separately before the same trial judge who presided at the defendant's trial. The trial judge at H's trial also denied H's motion to suppress R's identifications, which involved the same identification procedure, and during H's sentencing indicated admiration for R for his conduct in cooperating with law enforcement and testifying. On H's appeal, the Supreme Court in *State* v. *Harris* (330 Conn. 91), modified the reliability standard under the federal constitution set out in *Neil* v. *Biggers* (409 U.S. 188) with respect to the admissibility of eyewitness identification testimony to provide broader protection under article first, § 8, of the Connecticut constitution. *Held*:

1. The defendant could not prevail on his claim that he was deprived of his right to due process under the federal and state constitutions when the trial court denied his motion to suppress the out-of-court and subsequent in-court identifications of him by R:

a. Even if R's identification of the defendant at the arraignment was unnecessarily suggestive, it was sufficiently reliable under the factors set forth in *Biggers*, as the trial court found, under the first two factors, that R was attentive during the encounter and had ample time to observe the assailant, who had nothing covering his face, that R was face to face with the assailant in a well lit area while the assailant went through R's pockets, and that R was next to the car while the defendant rummaged through it, and those findings were supported by the evidence, as the court was entitled to credit R's testimony that the assailants were at the car a little more than ten minutes and that the car's interior lights illuminated the defendant's face as he as rummaged through the car, R had a good view of the assailant for a considerable period of time, and R was not under the influence of drugs or alcohol at the time of the robbery and consciously tried to record a memory of the passenger side assailant so that he could later retaliate against him; moreover, under the third *Biggers* factor, R's detailed description of the defendant conformed with considerable accuracy to information in the record concerning the defendant's physical appearance, as the defendant did not dispute that he had a full beard, consistent with R's description of the assailant at the time of the robbery, any difference in appearance between R's description of the assailant's beard and the appearance of the defendant's beard two weeks later at the arraignment did not render R's identification of the defendant unreliable, the fourth *Biggers* factor, which pertained to R's level of certainty, strongly favored the reliability of the identification, as R stated that he was 100 percent certain immediately after he identified the defendant at the arraignment, and the fifth *Biggers* factor, the two week length of time between the crime and the arraignment, did not undermine the reliability of R's identification; furthermore, R's failure to identify the defendant in police photographic arrays prior to the arraignment did not undermine the reliability of his identification of the defendant at the arraignment, as a photograph of the defendant

in one of the arrays had been outdated, R testified that it was the defendant's whole body structure, demeanor and the way he walked that caused him to be 100 percent certain of his identification, the court was not required to credit the testimony of the defendant's eyewitness identification expert as to whether R's identification was undermined by certain factors and was entitled to afford weight to the factors on which it relied, and because R's pretrial identification of the defendant was sufficiently reliable, the court correctly denied the defendant's motion to suppress R's subsequent in-court identification of him.

b. The defendant's claim that R's identifications of him should have been suppressed under article first, § 8, of the Connecticut constitution was unavailing: the trial court's application of the *Biggers* framework was harmless, as it was not reasonably possible that the court would have reached a different conclusion under the modified reliability standard adopted in *Harris*, and the defendant's claim to the contrary notwithstanding, the variable of unconscious transference—the mistaken identity of a face seen in one context as a face seen in another context—was not fatal to the trial court's application of *Biggers*, as the factors in *Harris* were generally comparable to the *Biggers* factors and were intended to more precisely define the focus of the relevant inquiry; moreover, there was no indication in the record that the trial court declined to consider any portion of the testimony of the defendant's eyewitness identification expert because it believed that the evidence was not relevant under *Biggers*, and the defendant did not identify any evidence that he was prevented from presenting at the suppression hearing or at trial on the ground that it was not relevant under *Biggers*.

2. The evidence was sufficient to support the defendant's conviction of robbery as against G:

a. The jury could have reasonably inferred that R knew that G had cash and his cell phone in the car prior to the defendant's and H's search of the vehicle, and that either the defendant, H or both had taken the property: R knew that G kept cash in the car's center console, the defendant and H searched the car until one of them said, "bingo, I got it," and then they exited the car and left, and R concluded that G's cash and cell phone were missing after checking the car to see if the defendant and H had taken G's cash; moreover, the defendant was not engaged in innocent, ordinary conduct when he approached the car with a gun, asked G and R where the drugs and money were, and struck R with the gun before searching the car, and there was no testimony regarding other possible explanations for the missing money and cell phone.

b. Notwithstanding the defendant's claim that he could have been convicted of robbery in the first degree only as an accessory, the evidence was sufficient to prove that he acted as a principal, as he and H approached G's car at the same time, both had guns, the defendant asked G and R where the drugs and money were, struck R with his gun, and forced G and R to exit the car, and both the defendant and H searched the car and left once G's cell phone and cash were found and taken.

3. The trial court did not abuse its discretion in denying the defendant's motion to disqualify the trial judge: there was no concern that the trial judge would have felt motivated, in ruling on the defendant's motion to suppress, to vindicate his conclusion at H's trial with respect to the identification of H, the trial judge was not confronted with the same question in considering the defendant's motion to suppress R's identification of him that he considered in H's motion to suppress, and heard different testimony and considered different evidence at the defendant's trial, which included the accuracy of R's description of the passenger side assailant and whether the other arraignees at the arraignment were similar in appearance to the defendant, and the judge's ruling on the defendant's motion to suppress involved considerations that were independent of R's credibility; moreover, the trial judge in the defendant's case did not make any statement to indicate that he prejudged the ultimate issues on which he was to rule, and his remarks about R at H's sentencing did not indicate that he prejudged the issues raised in the defendant's motion to suppress or reflect an opinion so extreme as to display clear inability to render fair judgment.

Argued January 5, 2017, and February 4, 2019—officially released July 23, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the first degree, and with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; subsequently, the court, *Clifford*, *J.*, denied the defendant's motion to disqualify the judicial authority; verdict of guilty of two counts of robbery in the first degree; thereafter, the court, *B. Fischer*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Michael Dearington*, former state's attorney, and *Brian K. Sibley, Sr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Emmit Scott, appeals from the judgment of conviction, rendered following a jury trial, of two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4).[1] On appeal, the defendant claims that (1) the trial court deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress an out-of-court and subsequent in-court identification of him, (2) there was insufficient evidence to support his conviction of robbery as against one of the victims, and (3) the court, *Clifford*, *J.*, abused its discretion by denying the defendant's motion to disqualify Judge Brian Fischer. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On July 31, 2012, the victims, Ruben Gonzalez and Jose Rivera, had been working together during the night shift at a warehouse in the town of Newington. When their shift ended at about 2:30 a.m., Gonzalez drove Rivera back to Rivera's home located at 49 Atwater Street in the city of New Haven. The victims arrived at Rivera's home at about 3 a.m., at which point Gonzalez parked in the driveway. They remained in the car, and Rivera began rolling a blunt of marijuana for Gonzalez. Approximately five minutes later, Rivera noticed three individuals, whom he did not recognize, riding bicycles in the street and passing by his house at least twice. Rivera became concerned and suggested to Gonzalez that they go to his backyard, but Gonzalez told him that he felt comfortable remaining in his vehicle. Moments later, two of the individuals, the defendant and Ernest Harris, approached the car on foot, with the defendant on the passenger side and Harris on the

[1] The defendant was acquitted of one count of murder and one count of felony murder.

driver's side. The third individual remained in the street on a bicycle.[2]

The defendant and Harris each had a gun. The defendant asked where the drugs and money were and ordered the victims to open their doors. The victims initially refused to exit the car but did so after the defendant struck Rivera on the head with his gun. After the victims exited the vehicle, the defendant searched Rivera and took $10 and Rivera's cell phone from his pants pockets. The defendant and Harris then rummaged through the interior of the car for approximately five minutes before finding and taking Gonzalez' cash and cell phone.[3] As the defendant and Harris left the scene, Gonzalez was shot twice and subsequently died as a result of his injuries.[4] The entire incident lasted approximately ten minutes.

Jeffrey King, Jr., an officer with the New Haven Police Department, was dispatched to 49 Atwater Street in response to a call that a person had been shot. Officer

[2] At trial, Rivera explained that the third individual remained on his bicycle, riding back and forth in the middle of the street, while telling the defendant and Harris to "hurry it up."

[3] At this time, Rivera did not see what was taken or who, as between the defendant and Harris, if not both, took it. On the basis of the evidence presented at trial, however, the jury reasonably could have found that either the defendant or Harris, or both, took Gonzalez' cash and cell phone. See part II of this opinion.

[4] At trial, Rivera testified that the defendant was the individual who shot Gonzalez. Specifically, he testified that as the defendant and Harris began to leave, Gonzalez yelled to the defendant, "I'll remember your face," whereupon the defendant turned and shot Gonzalez twice. The jury, however, found the defendant not guilty of murder and felony murder.

On appeal, in arguing that the trial court's admission of the identification evidence amounts to harmful error, the defendant mentions that "the jurors returned a mixed verdict [that] was most likely the result of compromise . . . ." Because we conclude that the trial court's admission of the identification evidence was not improper; see part I of this opinion; we need not address the defendant's argument that the admission of such evidence amounts to harmful error.

King arrived to the scene at approximately 3:30 a.m.[5] Rivera told Officer King that three males had been there, and that the passenger side assailant[6] was a black male, approximately five feet, five inches tall and 160 pounds, and had been wearing a white hat, backwards, and a black T-shirt. Francis Melendez, a detective with the New Haven Police Department, recovered two spent cartridge casings, as well as a ten dollar bill and coins from the ground next to Gonzalez' car. Inside the car, Detective Melendez located a few small, translucent "Ziploc type" bags containing a powder like substance,[7] as well as coins inside the center console. Detective Melendez was able to lift several fingerprints from Gonzalez' car, which he sent to the West Haven Police Department for processing.

At approximately 4 a.m., Rivera met with Nicole Natale and David Zaweski, detectives with the New Haven Police Department, and again provided descriptions of the assailants. He described the passenger side assailant as having a "Rick Ross"[8] type beard, which had been neatly groomed and was about one to two inches off of his face. The next day, on August 1, 2012, Detective Natale brought Rivera to meet with a sketch artist. Rivera was able to provide the sketch artist with a description of the passenger side assailant, and in that description, noted that the passenger side assailant had a full beard. That same day, Detective Natale presented Rivera with two separate photographic arrays.

[5] Despite the early morning hour, Officer King noted that the scene was well lit due to the streetlights.

[6] Although Rivera had been providing a description of "the shooter," Rivera interchangeably referred to this single individual as the individual who had been on the passenger side of the car, as well as the individual who shot Gonzalez. Because the jury found the defendant not guilty of murder and felony murder, we refer to this individual as the passenger side assailant.

[7] The powder like substance was not tested.

[8] Rivera testified that Rick Ross is a rapper who has a distinctive beard. The state introduced a photograph of Rick Ross into evidence.

Neither photographic array included the defendant. Rivera did not identify anyone in the photographic arrays as either the driver's side assailant or the passenger side assailant.

During the course of her investigation, Detective Natale received information that an individual with the nickname Semi might have been involved in the July 31, 2012 incident, and later learned that the defendant had the nickname Semi. Thereafter, on August 8, 2012, Detective Natale presented Rivera with a third photographic array,[9] which included a photograph of the defendant that had been taken in March, 2011, one and one-half years earlier. Rivera did not make an identification during this photographic array procedure.[10]

On August 10, 2012, Detective Natale and Detective Zaweski interviewed the defendant.[11] The defendant initially denied that he was at 49 Atwater Street on the night of July 31, 2012. Eventually, the defendant admitted that he had been at that location, with Harris and a third individual with the nickname Do.[12] He maintained,

[9] Unlike the first two photographic arrays, which the police referred to as "photo boards" and included the presentation of eight photographs on a single page, this third photographic array consisted of eight separate photographs. Rivera looked at these photographs for approximately four to five minutes.

[10] Although Rivera initially commented on one of the individuals having a nose and eyes similar to those of one of the assailants, he did not ultimately identify anyone during this procedure.

[11] On August 10, 2012, the police also interviewed Harris, but Harris did not provide the police with any information.

[12] During the course of her investigation, Detective Natale learned that a man named Dana Pettaway went by the nickname of Do. Although Detective Natale attempted to speak to Pettaway, he was not cooperative. Pettaway was not arrested in connection with this incident.

At trial, the state entered into evidence a photograph of Pettaway that had been obtained by Detective Zaweski. This photograph, however, was not presented to the defendant and, therefore, the defendant did not identify Dana Pettaway as the third individual who had been present at 49 Atwater Street at the time of the shooting. On the basis of this evidence, and upon the defendant's request, the court instructed the jury as to third-party culpability.

however, that he had not been there when Gonzalez was shot. Rather, he told the police that, earlier that morning, he had purchased marijuana from Gonzalez from the passenger side of his car. The defendant stated that he, Harris, and Do then rode their bicycles down the street, but that Do and Harris turned around to return toward the direction of 49 Atwater Street. The defendant told the police that he ultimately decided to return to 49 Atwater Street "[t]o see what [was] . . . taking them so long" and saw that everyone was outside of the car. He saw that Do had his gun out, and he heard Gonzalez say something to the effect of, "I know who you are," or, "I know y'all faces." The defendant maintained that, at this point, he turned around and started riding his bicycle toward Pine Street, which was adjacent to Atwater Street, when he heard gunshots.[13] He denied knowing who shot Gonzalez. That same day, after the police had interviewed the defendant, a fingerprint found on the front passenger side door of Gonzalez' car was identified as belonging to the defendant.[14]

Thereafter, the police learned that both the defendant and Harris were due to be arraigned on unrelated charges in New Haven on August 13, 2012. Robert F. Lawlor, an inspector with the state's attorney's office in the judicial district of New Haven, accompanied Rivera to the courthouse on that day so that Rivera could observe the arraignments and possibly identify the driver's side and passenger side assailants. Although

[13] At trial, Detective Natale testified that she obtained video surveillance footage from a nearby nursing home facility located on Pine Street. This video footage appeared to show three individuals riding back and forth on Pine Street on bicycles. At approximately 3:27 a.m., the video shows a single individual on a bicycle ride west on Pine Street, toward Atwater Street, then two minutes later, travel east on Pine Street, away from Atwater Street. Seconds later, two additional individuals travel in the same direction, away from Atwater Street. The individuals in the footage could not be identified.

[14] In addition, a fingerprint found on the driver's side door of Gonzalez' car was identified as belonging to Harris.

Inspector Lawlor knew that the defendant and Harris were to be arraigned, he did not inform Rivera of that fact, and he never made Rivera aware of the defendant's name. The defendant and Harris were among fourteen arraignees who were in custody awaiting arraignment. Lawlor and Rivera sat in the front row of the courtroom's public gallery, with Lawlor seated six to eight seats away from Rivera. From his vantage point, Rivera watched the defendant, Harris, and twelve other custodial arraignees, all of whom were handcuffed and surrounded by marshals, enter the courtroom single file through the courtroom doors. Rivera recognized the defendant and Harris "[i]nstantly"[15] when they walked through the doors. Once he was outside the courtroom, Rivera told Inspector Lawlor that he was "100 [percent certain] that those [were] the guys."[16]

A jury trial followed, at the conclusion of which the defendant was found not guilty of murder and felony murder, and guilty of two counts of robbery in the first degree. The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of forty years of imprisonment, execution suspended after thirty years, followed by five years of probation. This appeal followed.

In connection with this same incident, Harris was tried separately and convicted of one count of felony murder, one count of conspiracy to commit robbery in

[15] As our Supreme Court noted in *State* v. *Harris*, 330 Conn. 91, 98 n.6, 191 A.3d 119 (2018), "[t]he trial court's . . . supplemental memorandum of decision, and testimony by Lawlor and Rivera differ on several details with respect to the arraignment process, for example, the order in which custodial arraignees entered, the number of arraignments observed, and the demographics of the arraignees. By all accounts, however, Rivera immediately identified [Harris] as he entered the courtroom, before he was actually arraigned."

[16] Rivera testified on cross-examination that Lawlor had responded that they may be the suspects, at which point the two men left the courthouse. Lawlor denied making that statement.

the first degree, and two counts of robbery in the first degree. See *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018). Harris appealed, and, on March 9, 2016, our Supreme Court, pursuant to Practice Book § 65-2, transferred Harris' appeal from this court to itself.

This court first heard oral argument in the defendant's appeal on January 5, 2017. On March 29, 2017, this court issued a stay in the defendant's case pending the final disposition of Harris' appeal. On September 4, 2018, *State* v. *Harris*, supra, 330 Conn. 91, was released by the Supreme Court. Thereafter, this court lifted the appellate stay and ordered the parties in the present appeal to file supplemental briefs to address the impact, if any, of *State* v. *Harris*, supra, 91, on this appeal. In addition to the supplemental briefing, this court ordered additional oral argument to be held on February 4, 2019. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress the out-of-court and subsequent in-court identification of him by Rivera. Specifically, he argues that the August 13, 2012 arraignment identification procedure was unnecessarily suggestive and that the resulting identification was not reliable under the totality of the circumstances. Even assuming that the identification process at issue in the present case was unnecessarily suggestive,[17] we conclude that Rivera's

[17] The identification procedure at issue in the present case is the same identification procedure that our Supreme Court considered in *State* v. *Harris*, supra, 330 Conn. 91. The state argues that, although the court in *Harris* concluded that this identification procedure was unnecessarily suggestive, the identification procedure in the present case was not unnecessarily suggestive because "[t]he evidence in this case differs from the evidence relied on in *Harris* in respects that support the trial court's finding that the procedure was not unnecessarily suggestive. The evidence here showed that the police did not focus Rivera's attention specially or exclu-

identification of the defendant was sufficiently reliable to satisfy federal due process requirements. Accordingly, for purposes of the federal constitution, the defendant was not entitled to suppression of those identifications. Moreover, we conclude that the trial court's failure to apply the state constitutional standard set forth in *State* v. *Harris*, supra, 330 Conn. 91, which provides broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony, was harmless because the court reasonably could not have reached a different conclusion under that more demanding standard.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant moved to suppress Rivera's identification of him at the arraignment proceeding and any subsequent identification that he might be asked to make of the defendant at trial. On January 14 and 15,

sively on the custodial arraignees. Rather, they told him to, and he did, look at everyone he saw in the courthouse, including up to fifty people in the main hallway, twenty-five people in the public section of the courtroom, and forty or so custodial and noncustodial arraignees."

It is true that, at the suppression hearing in the present case, Inspector Lawlor testified that he told Rivera to look at people throughout the courthouse, including the main hallway and in the courtroom. In addition, Rivera testified that he did, in fact, look at people in the main hallway to see if he recognized anyone. Rivera, however, also acknowledged that he knew he was not there to see if anyone in the main hallway looked familiar and that Inspector Lawlor told him to look at the arraignees that would be brought through a door into the courtroom. Moreover, in *Harris*, the trial court similarly heard testimony that Inspector Lawlor told Rivera to look at the general population in the courthouse to see if anyone looked familiar. Our Supreme Court nonetheless held that the actual, operative array from which Rivera identified the defendants consisted solely of the fourteen custodial arraignees. *State* v. *Harris*, supra, 330 Conn. 104–105.

Because we conclude that Rivera's identification of the defendant was sufficiently reliable *even if* the identification process was unnecessarily suggestive, we need not address whether any differences in the evidence presented at the defendant's suppression hearing, as compared to Harris' suppression hearing, warrant a different conclusion as to the suggestiveness of the identification procedure.

2015, the court held a hearing on the motion. In addition to hearing testimony from Rivera, Inspector Lawlor, Detective Natale and Michael Udvardy, a private investigator, the court heard testimony from Steven Penrod, a psychologist, who was present at the hearing as the defendant's expert witness on eyewitness identifications. Dr. Penrod opined that the arraignment identification procedure was unnecessarily suggestive. He also testified as to numerous variables that could have affected the accuracy of Rivera's identification of the defendant. At the conclusion of the hearing, the court denied the motion in an oral ruling. At trial, Rivera testified and identified the defendant as the passenger side assailant.

In a supplemental memorandum of decision issued after the trial, the court set forth its reasons for denying the defendant's motion to suppress. It found that the arraignment identification procedure was not unnecessarily suggestive because, of the thirty-four total arraignees, fifteen to twenty were African-American males,[18] and of the custodial arraignees, all were male and the majority of them were African-American, which matched the description of the passenger side assailant that Rivera provided to Detective Natale. Specifically, the court found that five of the African-American males who had been arraigned that day were similar to the defendant, considering their height, weight and age. The trial court also found that, even if the identification procedure was unnecessarily suggestive, the identification itself was reliable under the totality of the circumstances. In support of its conclusion, the trial court observed the following: Rivera had approximately ten

[18] The trial court, in its supplemental memorandum of decision, first found that fifteen African-American males had been arraigned that day, but subsequently found that twenty African-American males had been arraigned that day. The parties do not raise any claim with respect to that numerical discrepancy.

minutes to observe and view the passenger side assailant during the commission of the crimes; the area was well illuminated; although the assailant had been wearing a baseball cap, it was worn backwards, which left his entire face exposed; Rivera was very close to the assailant during the crimes, and he was face to face with the assailant as he was going through Rivera's pockets taking his money and cell phone; Rivera was right next to the car as the assailant spent several minutes rummaging through the car with the car's interior light illuminating the defendant's face and features; Rivera indicated that the assailant had a distinctive beard, which he referred to as a "Rick Ross" beard; Rivera's attention was not impaired by alcohol or drugs; Rivera was able to recall the assailant's approximate age, height, weight, hairstyle and skin tone, as well as the clothes he was wearing; at the arraignment, Rivera had an unobstructed view of the defendant, who walked within a few feet of him; Rivera immediately identified the defendant as the passenger side assailant when the defendant came through the door for his arraignment; Rivera was 100 percent certain that the defendant was the passenger side assailant; and the length of time between the crimes and Rivera's identification of the defendant was fewer than fourteen days.

A

The following legal principles govern our analysis of the defendant's federal constitutional claim. "In the absence of unduly suggestive procedures conducted by state actors, the potential unreliability of eyewitness identification testimony ordinarily goes to the weight of the evidence, not its admissibility, and is a question for the jury. . . . A different standard applies when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both the initial identification and the in-court

identification may be excluded if the improper procedure created a substantial likelihood of misidentification. . . .

"The test for determining whether the state's use of an unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and, consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 100–101. "Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . . Furthermore, [b]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . Nevertheless, [w]e will reverse the trial court's ruling [on evidence] only [when] there is an abuse of discretion or [when] an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of [fact bound] determinations, which a trial court is far better equipped than this court to make,

we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error. . . . Finally, the burden rests with the defendant to establish both that the identification procedure was unnecessarily suggestive and that the resulting identification was unreliable." (Citations omitted; internal quotation marks omitted.) Id., 101–102.

Assuming that the identification procedure was unnecessarily suggestive,[19] we consider whether the identification was nevertheless admissible. "An identification that is the product of an unnecessarily suggestive identification procedure will nevertheless be admissible, despite the suggestiveness of the procedure, if the identification is reliable in light of all the relevant circumstances. . . . As mandated in *Neil* v. *Biggers*, supra, 409 U.S. 188, and reiterated by the court in *Manson* v. *Brathwaite*, supra, 432 U.S. 98, for federal constitutional purposes, we determine whether an identifi-

[19] With respect to the first prong of the test, the court in *Harris* concluded: "[W]e disagree with the trial court's conclusion that the arraignment procedure was not unnecessarily suggestive because that conclusion was based on a clearly erroneous factual finding. Specifically, the trial court found that the composition of the corporeal array was not unnecessarily suggestive because, of thirty-four total arraignees, fifteen of them matched Rivera's description of the driver's side assailant with respect to race (African-American) and gender (male). The court's conception of the array as consisting of the thirty-four arraignees, however, was significantly broader than the actual, operative array from which Rivera identified the defendant." (Footnote omitted.) *State* v. *Harris*, supra, 330 Conn. 104.

The court stated that "[t]he proper starting point for the trial court's analysis of the composition of the array . . . should have been the fourteen custodial arraignees, only nine of whom were African-American males." Id., 105. The court concluded that the procedure was unnecessarily suggestive "[b]ecause none of [the] custodial arraignees was sufficiently similar to the defendant in height, weight and age"; id., 108; and, therefore, "the physical differences between the suspect and the custodial arraignees in the present case were clearly significant enough to emphasize or highlight the individual whom the police believe[d] was the suspect." (Internal quotation marks omitted.) Id., 107. To the extent that the testimony on this issue before the trial court in the present case differed from that in *Harris*, see footnote 18 of this opinion.

cation resulting from an unnecessarily suggestive procedure is reliable under the totality of the circumstances by comparing the corrupting effect of the suggestive identification against factors including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the [identification], and the time between the crime and the [identification]." (Citation omitted; internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 108. Here, as in *Harris*, the trial court made express findings regarding each of the *Biggers* factors, which we now address in turn.[20]

With respect to the first two *Biggers* factors, the trial court found that Rivera had "ample time"—approximately ten minutes—to observe the assailant. Moreover, the court found that Rivera observed the assailant from a "very close" distance, and was face to face with the assailant as the assailant was going through his pockets, and right next to the car while the defendant rummaged through it, in a well lit area. The trial court further found that Rivera was attentive[21] during his

[20] Because this case involves the same incident and the same witness, our analysis is similar to that of our Supreme Court in *State* v. *Harris*, supra, 330 Conn. 91. In *Harris*, the court concluded that the identification of the defendant was sufficiently reliable for purposes of the federal constitution. Id., 113. Despite the court's holding in *Harris*, the defendant maintains that the identification was not reliable for purposes of the federal constitution. He argues that, "[u]nlike in *Harris*, Rivera's description of the suspect did not match that of [the] defendant in regards to the distinctive beard the suspect had. Moreover, Rivera had already seen a photograph of the defendant prior to the arraignment and failed to pick it out, a factor not present in *Harris* and which the trial court did not consider. Thus, the holding in *Harris* that the identification was reliable under the federal constitution is not applicable here." For the reasons set forth in this opinion, we are not persuaded.

[21] The trial court found that Rivera's attention was not impaired by alcohol or drugs, that being struck in the head by the assailant's gun did not affect Rivera's ability to observe the events that evening, and it credited Rivera's testimony that he focused on the assailant's face.

encounter with the assailant, who had nothing covering his face.[22] These findings strongly support the trial court's conclusion concerning the reliability of Rivera's identification of the defendant as the passenger side assailant, even assuming that the state used a flawed identification procedure. See *State* v. *Harris*, supra, 330 Conn. 109.

The defendant, however, challenges the trial court's findings as clearly erroneous. In particular, he maintains that Rivera initially told Detective Natale that the incident "happened very quickly," contrary to the court's finding that Rivera had approximately ten minutes to observe the assailant, and that the area was not well illuminated.[23] Having carefully reviewed the record, we disagree with the defendant that the trial court's findings are unsupported by the evidence.

First, the court's finding that Rivera had approximately ten minutes to observe the assailant was supported by Rivera's testimony that the assailants had been at the car "a little more than ten minutes." Moreover, regardless of the configuration of the lights, the trial court reasonably concluded that there was sufficient light in the area such that Rivera had a good view of the assailant for a considerable period of time. See *State* v. *Harris*, supra, 330 Conn. 109. In addition to Rivera's testimony that there had been a porch light and a streetlight, he testified at trial that the lighting was such that he could see down the street and that he did not have difficulty seeing the assailants' faces.

[22] The court found that, although the assailant had been wearing a hat, it was worn backwards and, therefore, his entire face was exposed.

[23] The defendant argues that, although the court found that the area was well illuminated by a streetlight and a light from 49 Atwater Street, "neither of these lit up the area" because "[t]he light on the porch was over the front door, there was a roof on the porch, and one had to walk up three steps onto the porch in order to see the light," and, although Rivera testified that there had been streetlights, he also acknowledged that there had not been one directly across the street from his house.

Further, Officer King, who arrived at the scene shortly after the incident, described the location as being "well lit" and having "high visibility" due to the streetlights. In addition, the trial court credited Rivera's testimony that the interior lights in the car illuminated the defendant's face as he was rummaging through the car.

The record also supports the trial court's finding that Rivera was attentive during the encounter. Rivera testified that he was not under the influence of drugs or alcohol at the time of the robbery, and he further explained that he consciously tried to record a memory of the passenger side assailant so that he could later retaliate against him for the robbery.[24] "[A] finding of reliability may be bolstered by the witness' conscious effort to focus on the face of his assailant." *State* v. *Harris*, supra, 330 Conn. 110. The trial court was therefore entitled to credit Rivera's testimony in this regard.

With respect to the third *Biggers* factor, the accuracy of the eyewitness' description of the offender, the defendant argues that Rivera's description of the assailant had been general, rather than specific, and that his description of the assailant's facial hair had not been accurate. We disagree. Rivera's description of the assailant was both specific and accurate, and included the individual's race (African-American), gender (male), approximate age (twenties), approximate body type (medium build), approximate weight (160 pounds), approximate height (five feet, five inches), facial hair style (full beard), and clothing (white hat, black T-shirt). This detailed description conforms with considerable accuracy to the information in the record concerning the defendant's physical appearance.[25]

[24] Rivera testified that he focused on the assailant's face "[j]ust to make sure that if [he were] to retaliate [he] would make sure [he] would grab the right person and not the wrong one."

[25] During her investigation, Detective Natale found that "[the defendant] matched the description of the person who had Mr. Rivera out of the car at gunpoint."

As we previously have noted, Rivera described the assailant as having a full beard, which he referred to as a "Rick Ross" type beard, which was neatly sculpted and one to two inches off of the assailant's face. Rivera acknowledged that, at the time of the arraignment procedure, the defendant's beard appeared "scruffy," or messy, and two to three inches long. On appeal, the defendant argues that "[t]he beard . . . is problematic because [the] defendant did not have anything resembling a Rick Ross beard when Rivera identified him not even two weeks after the shooting. While Rivera claimed that it was [the] defendant's beard that connected him to the gunman, he admitted that [the] defendant's beard was messy, scraggly and had hair all sticking out—a far cry from the sculpted, groomed Rick Ross beard that was rounded under the chin and one to two inches long." We are not persuaded by the defendant's argument.

The defendant does not dispute that he has a full beard, consistent with Rivera's description of the assailant. Moreover, Rivera's description was based on how the assailant appeared at the time of the incident, on July 31, 2012. The arraignment procedure did not take place until two weeks later, on August 13, 2012. Given the passage of time, we cannot conclude that Rivera's description of the beard, as it appeared on July 31, 2012, was inaccurate.[26] Accordingly, we conclude that any difference in appearance between Rivera's description of the assailant's beard and the appearance of the defendant's beard, two weeks after the incident, does not render Rivera's identification of the defendant unreliable.[27]

[26] In addition to natural hair growth, the beard could have appeared different on the basis of grooming, or lack thereof, during that intervening two week time period.

[27] Regardless of any differences between Rivera's description of the beard and the appearance of the defendant's beard two weeks later, Rivera told Inspector Lawlor that it was the same beard. Moreover, Rivera did not identify the defendant based solely on the appearance of his beard. Rivera

The defendant also argues that the court's finding that Rivera was able to observe the assailant's hairstyle, skin tone, and clothing is clearly erroneous. We disagree. Rivera told Officer King, the responding officer, that the assailant was a black male who had been wearing a white hat and black T-shirt. Moreover, although Rivera could not see the assailant's hair because it was under his hat, he was able to observe the assailant's facial hair style, and told Detective Natale and Detective Zaweski, whom he met with less than two hours after the incident, that the assailant had a full, neatly groomed "Rick Ross" type beard. The court's finding, therefore, is supported by the evidence.

The fourth relevant consideration under *Biggers*, the level of certainty that Rivera displayed with respect to his identification of the defendant, also strongly favors the state's contention that Rivera's identification was reliable for purposes of the analysis required under the federal constitution. Rivera demonstrated not just high confidence in his identification, but "100 percent" certainty immediately after identifying the defendant.

With respect to the final *Biggers* factor, namely, the length of time between the crime and the identification, we find no merit to the defendant's contention that the two week period between the date of the crime and Rivera's identification of the defendant undermined the reliability of that identification. See *State* v. *Harris*, supra, 330 Conn. 112–13.[28]

testified that, in addition to the defendant's beard, "[i]t was the eyes . . . the cheekbones, the nose . . . you can't forget a person's eyes. You can't forget it. That's stuck in your head." He stated: "You can't forget a face like that." In addition, Rivera testified that it had not just been the defendant's face that caused him to be 100 percent certain in his identification—it was "his whole body structure, like, his whole demeanor . . . like, the way he was walking . . . ."

[28] In reaching this same conclusion, our Supreme Court noted: "In a previous case, we held that the reliability of an identification was not compromised when made in connection with an unduly suggestive arraignment procedure conducted less than one month after the crime . . . and we have reached the same conclusion despite a delay of two and one-half months

The defendant argues that the trial court "failed to take into account numerous factors that weakened the identification." First, the defendant argues that the identification was unreliable because Rivera failed to choose his photograph in the August 8, 2012 photographic array procedure and that the trial court "ignored this evidence." In its memorandum of decision, however, the court acknowledged that the defendant's photograph was included in the August 8, 2012 array and that Rivera failed to make a positive identification during the procedure. In doing so, the court found that the photograph of the defendant that had been included in the array was "outdated . . . ." This finding is supported by Detective Natale's testimony that the photograph of the defendant was not current and that it had been taken in March, 2011, one and one-half years earlier.

Moreover, Rivera testified that he is not the type of person who can look at a photograph and make an identification. He explained that "[with] pictures, you really don't see the whole body of the person. It just shows you the face of them, so you really don't know if they're really chubby, and you don't know if they're tall . . . you don't know anything about that." Similarly, Rivera testified that it had not just been the defendant's face that caused him to be 100 percent certain in his identification—it was "his whole body structure, like, his whole demeanor . . . like, the way he was walking . . . ." Accordingly, Rivera's failure to identify the defendant in the photographic array procedure does not lead us to conclude that his identification of the defendant, at the subsequent arraignment procedure, was unreliable.

between the crime and an identification following the eyewitness' viewing of an unnecessarily suggestive photographic array." (Citation omitted.) *State* v. *Harris*, supra, 330 Conn. 112.

The defendant also argues that the reliability of Rivera's identification of him was undermined by numerous factors, including the "weapon focus" effect and the effect of stress on Rivera's ability to observe the assailant, cross-race impairment, unconscious transference, and the weak correlation between a witness' confidence in his or her identification and the identification's accuracy. He argues the trial court failed to consider Dr. Penrod's testimony concerning these factors.[29]

First, in attempting to call into question the propriety of the trial court's finding regarding Rivera's level of attentiveness, the defendant relies on Dr. Penrod's testimony concerning the "weapon focus" effect and the effect of stress on Rivera's ability to observe the assailant.[30] The "weapon focus" effect is "a phenomenon whereby the reliability of an identification can be diminished by a witness' focus on a weapon . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 110. At the suppression hearing, Dr. Penrod explained that "the concern about the presence of a weapon at the scene of a crime is that it could attract people's attention away from the face of the perpetrator . . . ." With respect to the effect of stress, Dr. Penrod

[29] Many of these factors had been recognized by our Supreme Court in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), as affecting the reliability of eyewitness identifications. Although *Guilbert* concerned the admissibility of expert testimony as to those certain factors affecting the reliability of eyewitness identifications, our Supreme Court, in *State* v. *Harris*, supra, 330 Conn. 91, endorsed those factors for determining the reliability of an identification under the due process provision of our state constitution. See part I B of this opinion. Our analysis under the federal constitution, however, continues to be governed by the *Biggers* framework. See *State* v. *Harris*, supra, 108.

[30] Specifically, the defendant argues that "Rivera's attention was impaired by the stress of the situation, the fact that he had been pistol-whipped, there was a gun in his face, and he was so angry that he couldn't focus on what was happening." Moreover, he argues that "Rivera testified [that] he was scared, upset and feared for his life, and that he told the police [that] he was rattled, yet the trial court never once mentioned those facts." (Internal quotation marks omitted.)

testified that being exposed to some level of physical violence, which includes being "pistol-whipped," would raise the stress level of an eyewitness, and that high stress conditions reduce the accuracy of eyewitness identifications.

The defendant also argues that cross-race impairment and unconscious transference undermine the reliability of Rivera's identification of him, and that the court should not have credited Rivera's confidence in his identification. With respect to "cross-race impairment," Dr. Penrod testified that studies have found "impairments [in identifications] whenever people were identifying somebody of a different race," and here, where Rivera is Hispanic and the perpetrator is African-American, there is the potential for cross-race impairment. Dr. Penrod also explained that unconscious transference, which is a phenomenon where "people can lose track of the context in which they had seen a face and mistakenly [identify] a face that they'd seen in one context as a face they've seen in another context," may have affected Rivera's identification in this case, where Rivera viewed a photograph of the defendant in the August 8, 2012 photographic array before identifying him in the August 13, 2012 arraignment procedure. In addition, the defendant argued that "although the court credited Rivera's claim [that] he was 100 percent certain that [the] defendant was the [assailant] . . . [t]here is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy." (Internal quotation marks omitted.)

First, we note that the court was not required to credit Dr. Penrod's testimony, nor was it required to set forth specific findings related to these factors. Moreover, "even though the evidence may have supported factors tending generally to undermine the reliability of the eyewitness identifications, the trial court was not required to afford more weight to those factors

here than to the factors upon which it relied." *State* v. *Day*, 171 Conn. App. 784, 822, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018).[31] Those factors upon which the court relied—Rivera's opportunity to view the perpetrator, his degree of attention, the time between the crime and the identification, and his level of certainty—are supported by the record and by law. See id., 823; see also *Manson* v. *Brathwaite*, supra, 432 U.S. 114.

Moreover, even if the trial court fully credited Dr. Penrod's testimony concerning the weapon focus effect and the effect of stress on Rivera's ability to view the assailant, the court reasonably could have concluded that, under the circumstances, these factors did not operate to appreciably impair Rivera's ability to focus his attention on the assailant. Although Rivera testified that he had focused on the defendant's gun and acknowledged that he was "in panic mode" at the time of the incident, he also testified, as we previously have noted, that he focused on the assailant's face. Moreover, Rivera had the opportunity to observe the passenger side assailant over the course of approximately ten minutes, including while the assailant searched his pockets and rummaged through the car, during which time the gun was not pointed at him.

Similarly, even if the trial court fully credited Dr. Penrod's testimony concerning witness confidence, the court reasonably could have concluded that, under the circumstances of this case, there was a relationship between Rivera's confidence and the accuracy of his

[31] In *State* v. *Day*, supra, 171 Conn. App. 820, the defendant argued, inter alia, that "[t]he presence of a gun . . . the effects of stress . . . [and] the effects of cross-racial identification" undermined the reliability of the witnesses' identifications of him. (Internal quotation marks omitted.) This court determined that "[a]lthough many of the defendant's arguments have merit, the factors he relies upon do not necessarily outweigh the factors underlying the trial court's conclusion." Id., 822. This court concluded, therefore, that the identifications of the defendant were not so unreliable as to require their suppression as evidence at the defendant's trial. Id., 823.

identification of the defendant. Although the defendant argues that there "is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy"; (internal quotation marks omitted); Dr. Penrod acknowledged that there is a relationship between eyewitness confidence and the identification's accuracy under certain circumstances. He testified that "[i]f [confidence is] measured at the time your identification is made before there's any possibility of feedback to the witness . . . there is a modest relationship between confidence and accuracy," as is the case here.[32]

For these reasons, we will not disturb the trial court's conclusion that the identification was reliable, for purposes of the federal constitution, under the totality of the circumstances. Consequently, the defendant cannot prevail on his federal due process claim that the trial court improperly denied his motion to preclude testimony concerning that identification. See *State* v. *Harris*, supra, 330 Conn. 113.

In light of our conclusion that the trial court properly found that Rivera's pretrial identification of the defendant was sufficiently reliable to pass muster under the

[32] Rivera expressed "100 percent" certainty immediately after identifying the defendant and before receiving any feedback from Inspector Lawlor. At the suppression hearing, defense counsel argued that Inspector Lawlor's statement to Rivera, after his identification of the defendant and Harris, that they may be the suspects; see footnote 16 of this opinion; could potentially have boosted Rivera's confidence, affecting the reliability of his identification. This argument was in line with Dr. Penrod's testimony that a statement such as Inspector Lawlor's was "a weak confirmation that the witness has made a correct identification," and that "if you give people some indication that they have made a correct identification it inflates their confidence, so if you then ask them how confident are you about your identification, you see that they can be much more confident about the identification than would be the case if you asked them before they got any feedback." Rivera, however, told Inspector Lawlor that he was 100 percent certain in his identification *before* Inspector Lawlor allegedly told him that the defendant and Harris may be the suspects, and Lawlor denied having made that statement to Rivera.

federal constitution, it follows that the trial court also was correct in denying the defendant's motion to suppress Rivera's subsequent in-court identification. "[W]hen the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor . . . both the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification." *State* v. *Dickson*, 322 Conn. 410, 420, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). In concluding that Rivera's identification of the defendant was reliable, however, we necessarily have rejected the defendant's contention that the procedure that produced it created a substantial likelihood of misidentification, such that it would be fundamentally unfair for the state to use it against the defendant. See *State* v. *Harris*, supra, 330 Conn. 91. It follows, therefore, that, because Rivera's out-of-court identification of the defendant was reliable, and therefore admissible, that identification, even if the product of an unnecessarily suggestive identification procedure, cannot be deemed to have so tainted the reliability of Rivera's in-court identification as to preclude the state from using it. See id.; see also *State* v. *Dickson*, supra, 430–31 (explaining that in-court identification of defendant is admissible when prior out-of-court identification of defendant also is admissible). For that reason, we also reject the defendant's challenge to the trial court's denial of his motion to suppress Rivera's in-court identification of him.

B

We next address the defendant's contention that he was entitled to suppression of Rivera's out-of-court and in-court identifications under the due process provision of article first, § 8, of the Connecticut constitution. In *State* v. *Harris*, supra, 330 Conn. 91, our Supreme Court

held that this provision affords greater protection than the federal due process clause with respect to the admissibility of an eyewitness identification following an unnecessarily suggestive identification procedure.[33] It concluded that it was "appropriate to modify the *Biggers* framework to conform to recent developments in social science and the law." Id., 115. Accordingly, it endorsed the factors for determining the reliability of an identification that it earlier identified as a matter of state evidentiary law in *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012),[34] and adopted the burden shifting framework embraced by the New Jersey Supreme Court in *State* v. *Henderson*, 208 N.J. 208, 288–89, 27 A.3d 872 (2011), for purposes of allocating the burden of proof with respect to the admissibility of an identification that was the product of an unnecessarily suggestive procedure.[35] *State* v. *Harris*, supra, 131.

[33] In doing so, our Supreme Court overruled its conclusion to the contrary in *State* v. *Ledbetter*, 275 Conn. 534, 569, 881 A.2d 290 (2005) (overruled in part by *State* v. *Harris*, 330 Conn. 91, 131, 191 A.3d 119 [2018]), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

[34] The *Guilbert* factors are: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54.

[35] "Pursuant to that framework, to obtain a pretrial hearing, the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that

In *Harris*, the defendant claimed that if the trial court had applied the proper standard, it would have been precluded from considering Rivera's level of confidence and would have been compelled to consider the following factors: the tendency of eyewitnesses to overestimate the duration and quality of their opportunity to view the perpetrator; Rivera's lack of sleep and the poor lighting at the scene of the crime; the tendency of fear and stress to impair perception and recall; the two week interval between the crime and the observation; Rivera's nonspecific description of the perpetrator's facial features; the effect of the presence of a weapon and high levels of stress on the accuracy of the identification; and the fact that Rivera and the defendant were of different races. Id., 135. Our Supreme Court disagreed. Id. The court concluded that, although these factors were not expressly included in the *Biggers* framework, "the trial court's application of the *Biggers* framework instead of the reliability standard . . . adopted [in *Harris*] was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of Rivera's identification under [the] new framework." Id., 137–38.

The defendant argues that "[t]he facts of this case compel a different result" because in the present case, unlike in *Harris*, there was a risk of unconscious transference.[36] We are not persuaded.

Although the variable of unconscious transference is not expressly included in the *Biggers* framework,

the identification was reliable in light of all relevant system and estimator variables. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) *State* v. *Harris*, supra, 330 Conn. 131.

[36] The defendant also argues that, unlike in *Harris*, Rivera's description of the defendant was not accurate due to his description of the assailant's beard. The accuracy of Rivera's prior description of the assailant, however, is expressly included in the *Biggers* framework. Thus, for the reasons set forth in part I A of this opinion, we are not persuaded.

as analyzed in our case, neither were the factors at issue in *Harris*. The court in *Harris* determined that "[a]lthough the specific factors that [the defendant's eyewitness identification expert] addressed are not expressly included in the *Biggers* framework, that framework does direct the court to consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, and the level of certainty demonstrated by the witness at the confrontation . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 136. The court explained: "[The] general factors [set forth in *Biggers*] encompass the more specific reliability factors that we have identified in the present case" and "the factors that we have adopted are generally comparable to the *Biggers* factors and are merely intended to more precisely define the focus of the relevant inquiry." (Internal quotation marks omitted.) Id. Thus, the variable of unconscious transference is not fatal to a finding that the trial court's application of the *Biggers* framework, instead of the reliability standard that our Supreme Court adopted in *Harris*, was harmless.

Moreover, Dr. Penrod, at the suppression hearing and at trial, testified as to the possible effect of unconscious transference. At the suppression hearing, after providing the court with a general explanation of unconscious transference, Dr. Penrod testified that, with respect to Rivera's identification of the defendant, unconscious transference "[a]bsolutely" may have come into play. At the conclusion of the hearing, defense counsel argued that unconscious transference affected the reliability of Rivera's identification of the defendant. As in *Harris*, there is no indication in the record that the trial court declined to consider any portion of Dr. Penrod's testimony because it believed that the evidence was not relevant under *Biggers*. See *State* v. *Harris*, supra, 330 Conn. 137. Finally, the defendant has not identified

any evidence that he was prevented from presenting at the suppression hearing or at trial on the ground that it was not relevant under *Biggers*. See id.

Accordingly, we conclude that the trial court's application of the *Biggers* framework, instead of the reliability standard that our Supreme Court adopted in *Harris*, was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of Rivera's identification under the new framework.

II

The defendant next claims that there was insufficient evidence to support his conviction of robbery as against Gonzalez. Specifically, he argues that there was no evidence that property had been taken from Gonzalez, and even if there were such evidence, there is no evidence that the defendant was the individual who took such property. On the basis of our review of the record, we conclude that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree as against Gonzalez.

The following additional facts and procedural history are relevant to our resolution of this claim. During the victims' drive from Newington to New Haven, they stopped at a gas station convenience store. Gonzalez handed Rivera cash, which he kept in the car's center console, for Rivera to purchase items at the store.[37]

[37] At trial, the following exchange occurred between the state and Rivera:

"Q. . . . [W]here did you get the money to pay for the stuff?

"A. I grabbed it from [Gonzalez].

"Q. What do you mean you grabbed it from [Gonzalez]?

"A. He handed me some cash and he said, go in the store for me, and I went in the store and grabbed him something.

"Q. Okay. Where did he get the money from?

"A. Work.

"Q. All right. Did he keep it in any place specific in his car? . . .

"A. In his center console, I mean, like the arm . . . the armrest where he normally put stuff in."

When the victims were at 49 Atwater Street, after the defendant and Harris approached Gonzalez' car, the defendant asked the victims where the drugs and money were. After Rivera exited the car, he watched the defendant and Harris rummage through Gonzalez' car, until he heard one of them say, "bingo, I got it," at which point the defendant and Harris stopped searching and left.

After Officer King responded to the scene and accompanied Gonzalez to a hospital, Rivera remained at 49 Atwater Street to talk to detectives. As he waited for the detectives to arrive, Rivera searched the car to see what the defendant and Harris took from Gonzalez. He discovered that the defendant and Harris had taken Gonzalez' cell phone and his cash.

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. "In reviewing a sufficiency of the evidence claim, we construe the evidence in the light most favorable to sustaining the verdict, and then determine whether from the facts so construed and the inferences reasonably drawn therefrom, the trier of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be [proven] beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of

evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 765, 120 A.3d 481 (2015).

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 17, 115 A.3d 447 (2015).

Section 53a-134 (a), with which the defendant was charged, provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." General Statutes § 53a-133 provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another

person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." General Statutes § 53a-119 defines larceny: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

The defendant raises two distinct arguments with respect to the sufficiency of the evidence for his conviction of robbery as against Gonzalez. Both arguments are based on his claim that there was insufficient evidence that he committed a larceny, a necessary element of robbery. Specifically, he argues that (1) there was no evidence that property had been taken from Gonzalez, and (2) even if there were sufficient evidence that property had been taken, there was no evidence that the defendant was the individual who took such property. We address each argument in turn.

A

The defendant first argues that there was insufficient evidence that he committed a larceny because there was no evidence that property had been taken from Gonzalez. Although the defendant acknowledges that Rivera took an inventory of Gonzalez' car and discovered that Gonzalez' money and cell phone were missing, he argues that "Rivera had no actual knowledge [that] there was money and a cell phone in the car prior to the 'robbery,' and he never saw what, if anything, the men took." We are not persuaded.

Contrary to the defendant's claim, the jurors did not have to resort to "mere conjecture or speculation alone." Rather, the jury could have drawn a reasonable

inference that Rivera knew that Gonzalez had cash and his cell phone in his car prior to the defendant's and Harris' search of the vehicle, and that either the defendant or Harris, or both, had taken the property, from the following evidence: Rivera knew Gonzalez kept cash in his center console;[38] the defendant asked the victims where the drugs and money were; the defendant and Harris searched the car until one of them said, "bingo, I got it," at which point they exited the car and left; Rivera checked Gonzalez' car specifically to see if the defendant and Harris had taken Gonzalez' cash;[39] and Rivera concluded that Gonzalez' cash and cell phone were missing.

The defendant nevertheless argues that his case is similar to *State* v. *Adams*, 164 Conn. App. 25, 141 A.3d 875 (2016). In *Adams*, the defendant had been convicted of conspiracy to commit larceny in the sixth degree based on the state's theory that the defendant stole Beats headphones from a Microsoft store located in the Danbury Fair Mall. Id., 27–28. On appeal, this court concluded that "the evidence was insufficient to prove beyond a reasonable doubt that the defendant or his alleged coconspirator committed a larceny"; id., 34; because "it was too great an inferential step for the court to take on this evidence to conclude that the defendant or his alleged coconspirator stole the missing headphones from the store." Id., 40.

[38] The defendant argues that "[t]here is a difference between Gonzalez 'normally' putting money in the center console and Rivera knowing for a fact there was money in the console that night." Rivera, however, had not testified that Gonzalez "normally" put money in the center console. Rather, he testified that Gonzalez gave him money to spend at the gas station convenience store and that Gonzalez kept his money in the center console, and *when describing the center console*, stated that it was where he "normally put stuff . . . ." See footnote 37 of this opinion.

[39] At trial, Rivera explained: "I had basically checked in the car to make sure what exactly did they take and, yes, *that the main priority to see if they did take his cash*, and that's exactly what happened. And they took his cell phone, my cell phone . . . and my cash and his cash." (Emphasis added.)

This court explained: "[T]he fact finder would have had to infer that the missing headphones actually had been stolen by someone and removed from the store, rather than lost or misplaced within the store or taken into the possession of another customer who had not yet presented them to a sales clerk to be purchased. *However, there was insufficient evidence to support such an inference because* [*the store manager's*] *own testimony established that the opposite was true.* According to [the store manager], although she believed that the headphones had been stolen, it was possible that another customer was walking around with them at the time their absence from the accessory area was first noticed by another store employee." (Emphasis added.) Id., 38. Moreover, this court emphasized that the defendant in *Adams* had been engaged in "innocent, ordinary conduct" when he was in the public area of a retail establishment where goods were displayed for sale. Id.

The facts of the present case are wholly distinguishable from those presented in *Adams*. The defendant had not been engaged in "innocent, ordinary conduct." To the contrary, he approached Gonzalez' car shortly after 3:30 a.m., with a gun, asked where the drugs and money were, struck Rivera on the head with his gun, and then searched Gonzalez' car. Moreover, unlike in *Adams*, where the store manager had testified that it was possible that another customer was walking around with the headphones at the time they were missing, there had been no testimony in the present case regarding other possible explanations for the missing money and cell phone. Thus, it was not "too great an inferential step" for the jury to conclude that Gonzalez' money and cell phone had been taken.

B

The defendant next argues that, even if there were sufficient evidence that property had been taken, there

was no evidence that the defendant was the individual who took such property. Specifically, the defendant argues that the state was limited to proving his criminal liability under § 53a-134 (a) solely as a principal and that it failed to do so. We are not persuaded.

As we determined in part II A of this opinion, there was sufficient evidence presented for the jury to conclude that either the defendant or Harris, or both, had taken Gonzalez' money and cell phone. There was, undisputedly, no evidence presented at trial as to who, precisely, the defendant or Harris, if not both, had taken these items.

The defendant is correct that, in the present case, he could not have been convicted on the basis of accessorial liability because the jury was not instructed on accessorial liability. The state does not argue otherwise. Rather, the state argues that "[t]he evidence showed that the defendant and Harris acted in concert as principals in the robbery [and] . . . [that] they were working together as a team of equals." We agree with the state.

The record does not support the defendant's assertion that he could only have been convicted as an accessory. An accessory is "[a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense . . . ." General Statutes § 53a-8 (a). In the present case, the evidence showed that the defendant and Harris, together, as principals, committed the robbery as against Gonzalez. Both approached Gonzalez' car at the same time, and both had guns. The defendant had been the person to ask the victims where the drugs and the money were, and the defendant had been the person to strike Rivera on the head with his gun, forcing the victims to exit the car. Both the defendant and Harris searched the interior of Gonzalez' car, and

once the property was found and taken—either by the defendant or Harris, or both—both men exited the car and left.[40] Thus, the evidence was sufficient to prove that the defendant acted as a principal. See *State* v. *Latorre*, 51 Conn. App. 541, 552, 723 A.2d 1166 (1999) (evidence sufficient to prove that defendant acted as principal where he and second individual, who had taken items from the victim, "were acting in concert to commit the crime"); see also *State* v. *Kalil*, 136 Conn. App. 454, 480, 46 A.3d 272 (2012) ("burglary and larceny are not crimes that only can be committed by one person at a time, rather they are crimes which can be committed simultaneously by more than one individual"), aff'd, 314 Conn. 529, 107 A.3d 343 (2014). Accordingly, we conclude that there was sufficient evidence to support the jury's finding that the defendant committed the crime of robbery against Gonzalez.

[40] The defendant argues that "he cannot be convicted for the acts of Harris," and "because the jurors were never told they could consider the acts of Harris as a basis for finding [the] defendant guilty of robbery, they could not have properly [found] him [guilty] on that basis." The defendant, however, was not convicted for the acts of Harris. There was no evidence presented at trial that Harris, rather than the defendant, had taken Gonzalez' cash and cell phone.

The defendant also argues that "if the state's theory at trial was that [the] defendant was guilty by acting in concert with Harris, it should have requested the court to include the 'or another participant' language from the robbery statute in its instructions." We disagree.

As previously stated, § 53a-134 (a), with which the defendant was charged, provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, *he or another participant in the crime* . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." (Emphasis added.)

In the present case, with respect to the robbery charge as against Gonzalez, the court omitted the language "or another participant" in its instruction to the jury. The "or another participant" language, however, does not relate to the commission of the larceny or robbery. Rather, it relates to the individual displaying or threatening the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm, which is not at issue on appeal.

III

The defendant lastly claims that the court, *Clifford*, *J.*, abused its discretion by denying the defendant's motion to disqualify Judge Fischer. Specifically, the defendant argues that "any reasonable person would question the judge's impartiality and whether he was predisposed to believing Rivera's testimony" at the suppression hearing because Judge Fischer presided over Harris' trial, ruled on Harris' motion to suppress involving the same identification procedure, and "indicated his admiration for [Rivera]" at Harris' sentencing. We disagree.

The following additional procedural history is relevant to our resolution of this claim. At Harris' sentencing, Judge Fischer made the following statements: "The surviving victim, Jose Rivera, cooperated with law enforcement officials, and he courageously entered into this courtroom and testified to his observations of the robbery and shooting," and, "I give Jose Rivera so much credit for cooperating with law enforcement and for having the fortitude and courage to come into this court and confront one of the men who committed this violent, senseless act."

On December 17, 2014, the defendant filed a motion to disqualify the court, *B. Fischer*, *J.*, from presiding over his case on the ground that Judge Fischer had presided over Harris' case. The defendant argued that because he would be making arguments similar to those of Harris in his motion to suppress, "a reasonable person would question Judge Fischer's impartiality in the instant matter on the basis of all the circumstances." The defendant submitted a memorandum of law in support of his motion, in which he argued that "Judge Fischer, in deciding [Harris'] motion to suppress the eyewitness identification, was the fact finder and made numerous findings that will be squarely at issue in

the defendant's case. It is unrealistic to expect Judge Fischer, or any judge, to stray from factual findings made in a prior case, in a subsequent case where the circumstances are substantially similar." On January 5, 2015, the court, *Clifford*, *J.*, held a hearing on the motion to disqualify Judge Fischer, at the conclusion of which it denied the motion.

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part that "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances . . . (1) [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . ." "In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted. . . . Our review of the trial court's denial of a motion for disqualification is governed by an abuse of discretion standard." (Citation omitted; internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

"[O]pinions that judges may form as a result of what they learn in earlier proceedings in the same case rarely constitute the type of bias, or appearance of bias, that requires recusal. . . . To do so, *an opinion must be so extreme as to display clear inability to render fair judgment.* . . . In the absence of unusual circumstances, therefore, equating knowledge or opinions acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal finds no support in law, ethics or sound policy." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Rizzo*, 303 Conn. 71, 121, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). "[C]ourts routinely hold that a judge's familiarity with a criminal defendant and his or her prior offenses through participation in a separate, earlier trial of the defendant . . . *or with his or her current offenses through participation in the trial of a codefendant* . . . does not create grounds for disqualification."[41] (Citations omitted; emphasis added.) Id., 120 n.39.

To support his argument, the defendant points to a variety of other cases, statutes, and rules of practice indicating that, when certain previously decided issues arise for a second time in criminal proceedings, a different judge generally should preside. See, e.g., *State* v. *Canales*, 281 Conn. 572, 599, 916 A.2d 767 (2007) ("the

[41] Although the defendant recognizes that a judge is not ordinarily disqualified from sitting on a case because he gained knowledge about the case or the defendant from his participation in a previous proceeding, he argues that "there is a recognized distinction between a judge who presides over a jury trial and a judge who must act as the fact finder in a proceeding." In *Rizzo*, however, our Supreme Court found persuasive *Boyd* v. *State*, 321 Md. 69, 581 A.2d 1 (1990), a case that involved successive court trials of codefendants by the same judge. In *Boyd*, the court ruled that there was no error in the denial of a motion for recusal, even though the judge acted as the fact finder in the defendant's trial and had previously acted as the fact finder in a codefendant's trial.

determination of probable cause required for issuing warrants, although not identical, is sufficiently similar to the determination required for the constitutional probable cause hearing to justify the extension, by implication, of the preference that a different judge preside over the probable cause proceedings"); General Statutes § 54-33f (a) (judge issuing search warrant may not hear motion to suppress evidence obtained as a result of that warrant); Practice Book § 41-17 (same); General Statutes § 51-183h (judge issuing arrest warrant cannot preside over hearing attacking validity or sufficiency of that warrant); General Statutes § 51-183c (judge cannot preside at a retrial if the case has been reversed on appeal and a new trial has been granted); Practice Book § 1-22 (a) (same). The defendant points out the concern present in these situations: "Some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time . . . ." (Internal quotation marks omitted.) *Liteky* v. *United States*, 510 U.S. 540, 562, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (Kennedy, J., concurring in the judgment).

The defendant argues that "[d]isqualification here is in accord with the policy behind these statutes and rules. There is no practical difference between preventing a judge who issued an arrest warrant from presiding over a probable cause hearing and preventing a judge who ruled on a motion to suppress in another case from ruling on a motion to suppress in a codefendant's case when the identification occurred at the same time in both cases and the judge has praised the courage of that eyewitness for coming forward." (Emphasis omitted.) We disagree.

In considering the defendant's motion to suppress Rivera's identification of him, Judge Fischer was not confronted with the same question that he considered in Harris' motion to suppress. Although the motions to

suppress in both cases involved the same identification procedure, Judge Fischer's ruling on the motion in the present case specifically addressed Rivera's identification *of the defendant*. Thus, in considering the defendant's motion to suppress, Judge Fischer heard different testimony and considered different evidence. For example, in the present case, Judge Fischer heard testimony from a different expert witness, who testified as to reliability factors unique to this case, such as unconscious transference. See part I of this opinion. Moreover, in his analysis of whether the identification procedure was unnecessarily suggestive, Judge Fischer considered whether the other arraignees present during the arraignment procedure were similar in appearance to the defendant, looking particularly at the defendant's height, weight, and age. Similarly, in considering whether Rivera's identification was reliable, Judge Fischer considered whether Rivera's description of the passenger side assailant was accurate by comparing Rivera's description to the defendant's unique characteristics. Accordingly, unlike the situations cited by the defendant, there is no concern that Judge Fischer would have felt motivated, in ruling on the defendant's motion to suppress, to vindicate his conclusion reached with respect to the identification of Harris.

The defendant also argues that his claim "is not that Judge Fischer should have been disqualified solely because he had previously presided over Harris' case . . . . Rather, it was the fact that Judge Fischer made remarks praising the courage of Jose Rivera, the state's key witness, which gave an appearance of partiality because it demonstrated he was predisposed to believe Rivera's testimony at [the] defendant's suppression hearing." (Citation omitted.) We are not persuaded.

In support of his argument, the defendant cites to several out-of-state cases, including *In re George G.*, 64 Md. App. 70, 494 A.2d 247 (1985), superseded by statute

in part as stated in *In re Demetrius J.*, 321 Md. 468, 476, 583 A.2d 258 (1991), *People* v. *Gibson*, 90 Mich. App. 792, 282 N.W.2d 483 (1979), leave to appeal denied, 408 Mich. 868 (1980), and *People* v. *Robinson*, 18 Ill. App. 3d 804, 310 N.E.2d 652 (1974).[42] In each of those cases, the trial judges presided over the defendants' respective bench trials and, accordingly, acted as the triers of fact with respect to the determination of the defendants' guilt or innocence. Before each trial, however, the judges in these cases made statements that

[42] The defendant also cites to *State* v. *Smith*, 200 Conn. 544, 512 A.2d 884 (1986), *People* v. *Silverman*, 252 App. Div. 149, 297 N.Y.S. 449 (1937), *Brent* v. *State*, 63 Md. App. 197, 492 A.2d 637 (1985), and *People* v. *Zappacosta*, 77 App. Div. 2d 928, 431 N.Y.S.2d 96, leave to appeal denied, 52 N.Y.2d 839 (1980). The present case, however, is readily distinguishable from each of those cases.

First, the courts in *Smith* and *Silverman* considered comments that a trial judge made *in front of a jury* regarding the credibility of witnesses. See *State* v. *Smith*, supra, 200 Conn. 551 ("the trial court questioned the state's principal witness in a manner that tended to enhance the witness' credibility in the jury's eyes"); see also *People* v. *Silverman*, supra, 252 App. Div. 174 ("defendants were prejudiced by the court's commendation of the witness . . . in effect admonishing the jury thereby that he was a reliable witness"). The comments were improper in those contexts because, in a jury trial, "[d]eterminations of credibility are solely the function of the jury." *State* v. *Smith*, supra, 550. In the present case, the defendant does not argue that Judge Fischer improperly commented on the credibility of Rivera in the presence of the jury. Accordingly, we are not persuaded by the courts' reasoning in *Smith* or *Silverman*.

In addition, the courts in *Brent* and *Zappacosta* determined that the trial judges, who presided over the defendants' respective bench trials, should have recused themselves because they had heard evidence in prior, related proceedings that was both incriminating and inadmissible as against the defendants. See *Brent* v. *State*, supra, 63 Md. App. 205 ("[t]here are times when evidence is so prejudicial that we cannot assume the trier of fact will be able to put the evidence aside and arrive at an impartial adjudication" [internal quotation marks omitted]); see also *People* v. *Zappacosta*, supra, 77 App. Div. 2d 930 ("[e]ven the most learned [j]udge would have difficulty in excluding all such information from his subconscious deliberations"). In the present case, the defendant does not argue that any evidence presented at Harris' trial was inadmissible as against the defendant, or that there was any evidence that Judge Fischer would have had to disregard or set aside in ruling on his motion to suppress. *Zappacosta* and *Brent*, therefore, do not provide persuasive support for the defendant's claim.

indicated they had prejudged the defendant's guilt. See *People* v. *Gibson*, supra, 797 (trial judge commenting on the defendant's guilt at conclusion of his codefendant's trial); see also *In re George G.*, supra, 77, 79 (trial judge telling defense counsel "[y]ou might be able to prove that [the defendant] is innocent," even though "[i]t is elementary that in a criminal case the state has the burden of proving, beyond a reasonable doubt, the guilt of the accused and that the accused need not prove his innocence" [emphasis omitted; internal quotation marks omitted]); *People* v. *Robinson*, supra, 808 (The trial judge concluded that the defendant was guilty at the conclusion of his codefendant's trial and stated, before the defendant's trial, "I heard the testimony. I came to that conclusion and my statement was correct." [Internal quotation marks omitted.]).

In the present case, unlike in *In re George G.*, *Gibson*, and *Robinson*, Judge Fischer did not make any statement to indicate that he prejudged the ultimate issues on which he was to rule with respect to the defendant's motion to suppress, namely, whether the identification procedure was unnecessarily suggestive and, if so, whether the identification was nevertheless sufficiently reliable. Even though the defendant claims that "Judge Fischer made remarks praising the courage of Jose Rivera," which the defendant characterizes as statements regarding Rivera's credibility,[43] these remarks do not indicate that Judge Fischer prejudged the issues raised in the defendant's motion. As we previously have noted, Judge Fischer's ruling on the defendant's motion to suppress involved considerations independent of Rivera's credibility, such as factors affecting the reliability of the identification, and whether the composition

[43] We do not view these remarks about Rivera's character as Judge Fischer's opinion with respect to Rivera's credibility. Rather, we view these remarks as being made in recognition that victims, and witnesses, may refrain from coming forward to speak with law enforcement out of fear of retaliation.

of the procedure included individuals sufficiently similar in appearance to the defendant.

Contrary to the defendant's arguments, Judge Fischer's statements do not reflect "an opinion . . . so extreme as to display clear inability to render fair judgment." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 303 Conn. 121. Accordingly, we cannot conclude that the court abused its discretion in denying the defendant's motion to disqualify Judge Fischer.

The judgment is affirmed.

In this opinion the other judges concurred.

BOARD OF EDUCATION OF THE TOWN OF STRATFORD ET AL. *v.* CITY OF BRIDGEPORT ET AL.
(AC 40525)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff boards of education for the towns of Stratford, Trumbull and Monroe, and the plaintiff F, a Stratford resident, brought this action against the defendants, the State Board of Education, the Commissioner of Education, the Board of Education of the City of Bridgeport, the city of Bridgeport, the mayor of Bridgeport and Bridgeport's interim superintendent of schools, seeking, inter alia, a declaratory judgment and injunctive relief in connection with the commissioner's authorizing, pursuant to statute (§ 10-264*l* [m] [2]), the Bridgeport board to charge neighboring school districts $3000 per year in tuition for each nonresident student who attended the city's interdistrict magnet schools. In their six count complaint, the plaintiffs alleged, in count one, that the commissioner did not apply the criteria set forth in § 10-264*l* (m) (2), various constitutional challenges to § 10-264*l* (m) (2) in counts two through four, unjust enrichment in count five and civil theft as to the Bridgeport defendants in count six. The trial court granted the defendants' motions to dismiss and render judgment thereon dismissing all counts of the complaint for lack of subject matter jurisdiction on the ground that the plaintiffs failed to exhaust their administrative remedies pursuant to the statute (§ 4-176) that permits any person to petition an agency for a declaratory ruling as to the applicability of a statute to specified circumstances. On the plaintiffs' appeal to this court, *held*:

1. The plaintiffs could not prevail on their claim that the trial court erred by dismissing counts one through four of their compliant against the state defendants for lack of subject matter jurisdiction for their failure to exhaust their administrative remedies:

   a. The trial court properly dismissed count one of the complaint, the plaintiffs having failed to exhaust their administrative remedies; the claim in count one, which sought a declaratory ruling as to the applicability of § 10-264*l* (m) (2) to the alleged circumstances, was the type of claim that the state board's hearing process was designed and intended to address, and, contrary to the plaintiffs' contention, the allegations in count one were not the type of special circumstances that our courts have determined warrant an exception to the exhaustion requirement, and, therefore, the plaintiffs had an available administrative process to challenge the commissioner's decision to authorize the charge of tuition, and their failure to exhaust this available process prior to commencing the present action divested the trial court of subject matter jurisdiction over count one.

   b. The trial court properly dismissed counts two, three and four of the complaint, which raised various as applied constitutional challenges to § 10-264*l* (m) (2), the plaintiffs having failed to exhaust their administrative remedies as to those counts; because the state board, which, pursuant to § 4-176, has the power to interpret statutes, was well positioned to provide the plaintiffs with the very relief that they sought in the trial court if they had brought a petition for a declaratory ruling, and the plaintiffs failed to sufficiently show how it would have been demonstrably futile to file a petition for a declaratory ruling with the state board, the plaintiffs did not avail themselves of the administrative process available to them and their failure to do so divested the trial court of subject matter jurisdiction over those counts of the complaint.

2. The trial court properly dismissed count six of the plaintiff's complaint, which alleged that the Bridgeport defendants committed civil theft in violation of the applicable statutes (§§ 52-564 and 53a-119 [1], [2], [3] and [6]), as that claim was not ripe for review, and, therefore, the court lacked subject matter jurisdiction over it; although the plaintiffs claimed that the ripeness doctrine did not bar their civil theft claim because they sought injunctive relief to prevent the city from unlawfully misappropriating the tuition moneys under color of state law and that requiring them to wait until the Bridgeport defendants unlawfully are in receipt of the money would render moot any claim for injunctive relief, injunctive relief was not a remedy available to the plaintiffs under § 52-564, which provides that a party aggrieved under the statute is entitled to treble damages, and the record clearly indicated that no payment for the tuition had in fact been paid out by the plaintiff boards to the Bridgeport defendants and no invoice for tuition had even been sent to the plaintiff boards at the time the Bridgeport defendants filed their motion to dismiss, and, therefore, it was apparent that the plaintiffs had

not suffered an injury sufficient to give rise to the alleged civil theft, particularly, in light of their failure to allege that the Bridgeport defendants intentionally deprived them of their property.

Argued January 31—officially released July 23, 2019

Procedural History

Action for, inter alia, a declaratory judgment that the defendants' request to charge certain tuition to certain school districts for nonresident students who attend certain magnet schools is erroneous and unlawful, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the Board of Education of the Town of Monroe was added as a party plaintiff; thereafter, the court, *Bellis*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Daniel L. Healy, with whom, on the brief, was *Norman A. Pattis*, for the appellants (plaintiffs).

Ralph E. Urban, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *George Jepsen*, former attorney general, for the appellees (defendant State Board of Education et al.)

John R. Mitola, associate city attorney, for the appellees (named defendant et al.).

Opinion

KELLER, J. The plaintiffs, the Board of Education of the Town of Stratford, James Feehan,[1] the Board of Education of the Town of Trumbull, and the Board of Education of the Town of Monroe, appeal from the judgment of the trial court granting the motions to dismiss filed by the defendants, the State Board of Education (state board); the Commissioner of Education

[1] The complaint alleges that "Feehan is a resident and taxpayer of the town of Stratford and a resident of the Stratford public school district. Additionally, he is the chairman of the Stratford Board of Education."

(commissioner); the Board of Education of the City of Bridgeport (Bridgeport board); the city of Bridgeport (city); Joseph Ganim, the mayor of the city; and Aresta Johnson, the interim superintendent of the city's schools.[2] On appeal, the plaintiffs claim that the trial court erred by (1) dismissing counts one, two, three, and four of their complaint against the state defendants for lack of subject matter jurisdiction for failing to exhaust their administrative remedies, and (2) dismissing count six, a civil theft claim against the Bridgeport defendants, for lack of subject matter jurisdiction for failing to exhaust their administrative remedies. For the reasons discussed herein, we affirm the judgment of the trial court.

In their verified complaint dated March 16, 2017, the plaintiffs alleged the following facts. The city, the Bridgeport board, and Johnson operate two interdistrict magnet schools, Fairchild Wheeler Interdistrict Magnet School (Fairchild Wheeler) and Interdistrict Discovery Magnet Elementary School (Discovery). The plaintiff boards are required, pursuant to General Statutes § 10-220d, to permit operators of interdistrict magnet schools to recruit students from their districts to attend magnet schools in other districts. Fairfield Wheeler and Discovery, which began operations in 2013, currently serve children from the plaintiffs' districts, in addition to others.

Fairfield Wheeler and Discovery, heretofore, have been operated exclusively with state funds. During the 2016–2017 school year, the parties learned that the state would reduce its grants to these magnet schools by

[2] For ease of exposition, we refer to the state board and the commissioner as the state defendants, and to the Bridgeport board, the city, Mayor Ganim, and Johnson, as the Bridgeport defendants. Any reference in this opinion to the defendants, refers to all the defendants. We will, however, refer to individual parties as necessary.

approximately $500,000. On June 30, 2016, Frances Rabinowitz, the predecessor to Johnson as interim superintendent of the city's schools, wrote a letter to the commissioner requesting permission for the city to bill neighboring districts $3000 a year for each nonresident student who attended the magnet schools. By letter dated August 31, 2016, the commissioner granted this request. The plaintiffs alleged that the commissioner's approval of the request to charge outside school districts would result in approximately $1,818,000 in revenue for the city's public school system. This revenue would result in the school system receiving $1,215,000 from the plaintiffs alone, which is $715,000 more than is required to replenish the $500,000 cutback in state funding.[3]

Furthermore, the plaintiffs alleged that the Bridgeport board commingles its operating accounts with the city's general municipal operating accounts. They alleged that this commingling permits the Bridgeport public school district and the city to convert or misappropriate the moneys supplied by the plaintiffs for the purpose of interdistrict magnet school operation to pay for nonmagnet school and noneducational expenses, such as general municipal operating expenses.

The plaintiffs set forth six counts in their complaint. They claimed that (1) the commissioner did not apply the criteria set forth in General Statutes § 10-264*l* (m) (2)[4] (count one); (2) § 10-264*l* (m) (2) violates principles

[3] We note that the complaint is conspicuously devoid of any allegations of loss with respect to Feehan as a Stratford taxpayer.

[4] General Statutes § 10-264*l* (m) (2) provides: "For the school year commencing July 1, 2015, and each school year thereafter, any interdistrict magnet school operator that is a local or regional board of education and did not charge tuition to a local or regional board of education for the school year commencing July 1, 2014, may not charge tuition to such board unless (A) such operator receives authorization from the Commissioner of Education to charge the proposed tuition, and (B) if such authorization is granted, such operator provides written notification on or before September first of the school year prior to the school year in which such tuition is to be charged to such board of the tuition to be charged to such board for

of due process as set forth in article first, §§ 1, 2, 8, 10, 11, 18, and 20, of the Connecticut constitution (count two); (3) § 10-264*l* (m) (2) exceeds the powers implicitly and explicitly granted to the General Assembly in article eighth, § 1, of the Connecticut constitution (count three); (4) § 10-264*l* (m) (2) violates the plaintiffs' right to home rule in violation of article tenth, § 1, of the Connecticut constitution (count four); (5) unjust enrichment (count five); and (6) civil theft as to the Bridgeport defendants (count six).

On March 24, 2017, the state defendants filed a motion to dismiss, inter alia, counts one through four of the plaintiffs' complaint for lack of subject matter jurisdiction on the basis that the plaintiffs failed to exhaust their administrative remedies contained in General Statutes § 4-176.[5] On April 12, 2017, the Bridgeport defendants also filed a motion to dismiss the plaintiffs' complaint in its entirety on the basis that the court lacked subject matter jurisdiction over the plaintiffs' claims against them. After receiving memoranda of law in support of and in opposition to the motions, the court heard

each student that such board is otherwise responsible for educating and is enrolled at the interdistrict magnet school under such operator's control. In deciding whether to authorize an interdistrict magnet school operator to charge tuition under this subdivision, the commissioner shall consider (i) the average per pupil expenditure of such operator for each interdistrict magnet school under the control of such operator, and (ii) the amount of any per pupil state subsidy and any revenue from other sources received by such operator. The commissioner may conduct a comprehensive financial review of the operating budget of the magnet school of such operator to verify that the tuition is appropriate. The provisions of this subdivision shall not apply to any interdistrict magnet school operator that is a regional educational service center or assisting the state in meeting the goals of the 2008 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended, or the goals of the 2013 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended."

[5] General Statutes § 4-176 provides in relevant part: "(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency. . . ."

oral argument regarding both motions to dismiss on April 24, 2017.

In a memorandum of decision dated May 10, 2017, the court granted the state defendants' motion to dismiss counts one, two, three, and four of the plaintiffs' complaint for lack of subject matter jurisdiction on the basis that the plaintiffs failed to exhaust their administrative remedies pursuant to § 4-176 prior to commencing the present action. With respect to count five, the dismissal of which is not challenged in this appeal, the court acknowledged that the plaintiffs had conceded that the plaintiffs' unjust enrichment claim against the state defendants was barred by the doctrine of sovereign immunity.

In a separate memorandum of decision dated May 23, 2017, the court recognized that the Bridgeport defendants, in their memorandum of law in support of their motion to dismiss, had expressly adopted the same arguments that had been set forth by the state defendants with respect to counts one, two, three, and four. Resultantly, in granting the Bridgeport defendants' motion to dismiss with respect to these counts, the court adopted the same reasoning concluding that the plaintiffs failed to exhaust their administrative remedies contained in § 4-176. With respect to counts five and six as alleged against the Bridgeport defendants, the court similarly concluded that it lacked subject matter jurisdiction over their claims because the plaintiffs failed to exhaust their administrative remedies. This appeal followed.

As a preliminary matter, we begin by setting forth the principles of law governing our standard of review. "In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary." (Internal quotation marks omitted.) *Walenski* v. *Connecticut State Employees Retirement*

Commission, 185 Conn. App. 457, 464, 197 A.3d 443, cert. denied, 330 Conn. 951, 197 A.3d 390 (2018). This court must decide whether the trial court's "conclusions are legally and logically correct and find support in the facts that appear in the record. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) Id., 464–65.

"When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . Further, in addition to admitting all facts well pleaded, the motion to dismiss invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Citation omitted; internal quotation marks omitted.) *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 485, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018).

This appeal concerns the proper application of the exhaustion doctrine. "It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003). In other words, "a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative

forum." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 477, 55 A.3d 251 (2012). In the absence of exhaustion of that remedy, the action must be dismissed. *Piteau* v. *Board of Education*, 300 Conn. 667, 678, 15 A.3d 1067 (2011). Thus, "where a statute has established a procedure to redress a particular wrong, a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure." *Norwich* v. *Lebanon*, 200 Conn. 697, 708, 513 A.2d 77 (1986).

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Internal quotation marks omitted.) *Coyle* v. *Commissioner of Revenue Services*, 142 Conn. App. 198, 206, 69 A.3d 310 (2013), appeal dismissed, 312 Conn. 282, 91 A3d 902 (2014).

I

The plaintiffs first claim that the court erred in dismissing counts one through four of their complaint for lack of subject matter jurisdiction on the basis that they

failed to exhaust their administrative remedies. The plaintiffs do not dispute that there was an administrative process available to them pursuant to § 4-176 (a). They also do not dispute that they did not avail themselves of that process. Rather, the plaintiffs argue that they were not required to exhaust their administrative remedies through this process because "the claims against the state defendants . . . involve the 'special circumstances' exception [to the exhaustion doctrine], or, in the alternative, the constitutional question exception to the exhaustion requirement . . . ."

Our Supreme Court repeatedly has held that "when a plaintiff can obtain relief from an administrative agency by requesting a declaratory ruling pursuant to § 4-176, the failure to exhaust that remedy deprives the trial court of subject matter jurisdiction over an action challenging the legality of the agency's action." *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 478, citing *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 557–58, 630 A.2d 1304 (1993) (plaintiff's claim for injunctive relief barred by exhaustion doctrine because plaintiff failed to seek declaratory ruling from Commissioner of Environmental Protection pursuant to § 4-176). The exhaustion doctrine, however, like many judicial doctrines, is subject to several exceptions. See *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 565. These exceptions have been employed infrequently and used only for narrowly defined purposes "such as when recourse to the administrative remedy would be futile or inadequate." (Internal quotation marks omitted.) Id.

Our Supreme Court has made clear that "a plaintiff may not circumvent the requirement to exhaust available administrative remedies merely by asserting a constitutional claim. . . . [S]imply bringing a constitutional challenge to an agency's actions will not necessarily excuse a failure to follow an available statutory appeal process. . . . [D]irect adjudication even of

constitutional claims is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure . . . which [the litigant] has chosen to ignore. . . . [W]e continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy. . . .

"Limiting the judicial bypass of colorable constitutional claims to those instances of demonstrable futility is consistent with our duty to eschew unnecessarily deciding constitutional questions . . . . Pursuant to that duty, we must limit circumvention of administrative proceedings to instances in which those proceedings would be futile because no adequate administrative remedy exists. Moreover, the mere assertion in an administrative proceeding of a constitutional challenge to a statute or agency procedure does not automatically satisfy the futility exception to the exhaustion doctrine. To determine whether a party properly may seek court intervention prior to the completion of administrative proceedings, we examine whether the court has been asked to address issues entrusted to the [commissioner] and whether the [commissioner] could issue appropriate relief." (Citations omitted; internal quotation marks omitted.) *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813–14, 12 A.3d 852 (2011).

A

With respect to count one of the plaintiffs' complaint, which alleged that the commissioner failed to comply with § 10-264*l* (m) (2) in rendering her initial authorization allowing the Bridgeport board to charge $3000 in tuition per pupil to the suburban school districts sending students to Fairfield Wheeler and Discovery, the plaintiffs essentially argue that, although on its face count one "looks and sounds like the very sort of issue

the [state] board's hearing process was designed and intended to address," the "complaint as a whole sounds in the use of the education financing statute as a form of indirect taxation." They argue that this tuition amounts to indirect taxation and is not the sort of issue that the state board's hearing process was designed to address. The plaintiffs acknowledge that count one does not raise a constitutional question, but they contend that the facts of the present case constitute special circumstances warranting an exception to the exhaustion requirement as our appellate courts have recognized in other instances.

In support of their arguments, the plaintiffs direct our attention to our Supreme Court's decisions in *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 797 A.2d 494 (2002), and *McKinney* v. *Coventry*, 176 Conn. 613, 410 A.2d 453 (1979). In both cases, the court considered a collateral challenge to the imposition of a tax based on the plaintiffs' claims that the tax in those cases were unconstitutional. In *Stepney Pond Estates, Ltd.*, the court determined, on the basis of the rationale set forth in *McKinney*, that the trial court did not lack jurisdiction to hear the claim because the plaintiff "challenge[d] the validity of the tax in the first instance," not that the tax "was improperly calculated." *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 420.

The plaintiffs acknowledge that *Stepney Pond Estates, Ltd.*, and *McKinney* are not "perfect fits" with respect to count one. We agree with them to that extent. It is clear from the language of count one that the plaintiffs are not challenging the constitutionality of the statute itself; they explicitly acknowledge in their appellate brief that count one is not constitutional in nature. Thus, it appears that the plaintiffs' reliance on *Stepney Pond Estates, Ltd.*, and *McKinney*, which involved facial constitutional challenges to tax statutes, is misplaced with respect to count one. Nevertheless, the plaintiffs argue

that one of the paragraphs in count one "frames the issue as more than mere misapplication of a technical statute," and further contend that "the commissioner ignored the statutory requirements altogether—the functional equivalent of denying a hearing, resulting in default." If anything, this argument is more akin to a claim raised in *LaCroix* v. *Board of Education*, 199 Conn. 70, 505 A.2d 1233 (1986), where the plaintiff alleged that the defendant board of education violated his right to due process by failing to provide him a hearing prior to, and for four months subsequent to, terminating his employment contract. Even so, in light of the facts of this case, we conclude that *LaCroix* is no more availing for the plaintiffs.

We read count one of the plaintiffs' complaint as a challenge to the commissioner's application of the criteria set forth in § 10-264*l* (m) (2) in authorizing the Bridgeport board to charge tuition to the suburban school districts. Although they attempt to argue that this count is actually a challenge to "indirect taxation" by the defendants and that the state board is ill equipped to review this type of claim, our review of the allegations in count one lead us to conclude that this is just the type of claim that the state board's hearing process was designed and intended to address. As the trial court correctly noted, the plaintiffs "[sought] a declaratory ruling as to the applicability of § 10-264*l* (m) (2) to the alleged circumstances, which is precisely the relief that the relevant agency, namely, the state board, has the statutory authority to provide pursuant to § 4-176 and by way of the rules set forth in §§ 10-4-21 and 10-4-22 of the [Regulations of Connecticut State Agencies]."[6]

[6] Section 10-4-21 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) Who May File. Any interested person(s) . . . may petition the agency, as appropriate, to issue a declaratory ruling regarding the validity of any regulation or the applicability to specified circumstances of any statute, regulation or order enforced, administered or promulgated by the agency. . . ." Subsection (b) of the regulation sets forth the petition requirements.

Despite the plaintiffs' asseverations, the allegations in count one are not the type of special circumstances that our courts have determined warrant an exception to the exhaustion requirement. Simply put, the plaintiffs had an available administrative process to challenge the initial tuition authorization by the commissioner where they could have informed the state board of what they perceived to be error in the commissioner's decision. Their failure to exhaust this available process prior to commencing this action divested the court of subject matter jurisdiction over count one. See *LaCroix* v. *Board of Education*, supra, 199 Conn. 78 (our courts "have long adhered to the rule that, where a statutory right of appeal from an administrative decision exists, an aggrieved party may not bypass the statutory procedure and instead bring an independent action to test the very issue which the appeal was designed to test" [internal quotation marks omitted]). The court, therefore, properly dismissed count one for lack of subject matter jurisdiction.

B

With respect to counts two through four of their complaint, the plaintiffs contend that each one raises independent constitutional claims warranting an exception to the exhaustion requirement. They argue that even if this court concluded that count one fell within the state board's regulatory ambit, the constitutional claims do not. In particular, they argue that the constitutional claims are independent, do not involve agency expertise or discretion, and are the type of constitutional claims our courts recognize as warranting an exception to the exhaustion requirement. In their appellate brief, the plaintiffs categorize counts two through four as follows: "Count two contends that this unusual

Section 10-4-22 of the Regulations of Connecticut State Agencies sets forth the procedure following the filing of a petition for a declaratory ruling.

tax amounts to a due process violation, depriving the [plaintiffs] of property without due process of law arising under the state constitution. Count three contends that this tax is imposed by executive fiat, and not legislative process, in violation [of] the state constitution's separation of powers doctrine. Count four contends that the tax in question is imposed in violation of the state constitution's home rule provision, effectively giving one town permission to tax residents of adjoining municipalities."

The defendants maintain that the plaintiffs' arguments on appeal evince a complete reversal of their characterization of the counts as represented to the trial court. Namely, they argue that the plaintiffs repeatedly characterized their constitutional claims as "as applied" before the trial court, but now, on appeal, make arguments that can only be read as being "facial" constitutional challenges. The defendants thus argue that the plaintiffs are bound by their representations to the trial court and may not pursue before this court a legal theory they did not pursue before the trial court.

This court has often stated that to allow a plaintiff to pursue one theory before the trial court and then to press a distinctly different theory on appeal would amount to an ambuscade of the trial court. See *Jahn* v. *Board of Education*, 152 Conn. App. 652, 665, 99 A.3d 1230 (2014). In such instances, we have declined to review those claims. See, e.g., *AvalonBay Communities, Inc.* v. *Zoning Commission*, 130 Conn. App. 36, 62 and n.24, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011). To the extent that the plaintiffs are arguing on appeal that counts two through four of their complaint are facial constitutional challenges, we decline to review them as such. As the defendants correctly note, the plaintiffs argued explicitly before the trial court that counts two through four were as applied constitutional challenges. Accordingly, we will review

whether these counts alleging as applied constitutional caims were properly dismissed by the trial court for the plaintiffs' failure to exhaust available administrative remedies.

The plaintiffs first rely on *LaCroix* v. *Board of Education*, supra, 199 Conn. 70, a case in which our Supreme Court allowed a plaintiff teacher to bring a civil action based on a due process property right violation because the defendant board failed to follow the process required by the Teacher Tenure Act, General Statutes § 10-151 (b), when it terminated the plaintiff's employment without first providing him a hearing. Id., 71–72. Under the specific factual circumstances of *LaCroix*, the court recognized an exception to the doctrine of exhaustion of administrative remedies and held that "the plaintiff's failure to follow the administrative appeal route to challenge the . . . termination did not preclude him from bringing a collateral judicial action to test this basic constitutional infirmity in the [defendant] board's termination process." Id., 81. The court explained that two circumstances led it to that conclusion: "the plaintiff's timely request for a hearing [was] evidence that he did not deliberately decide to bypass the statutory appeal route, and the defendant board's unwillingness to provide the hearing within the statutory period was a significant contributing factor in the plaintiff's failure to pursue a direct appeal." Id. The court explained that "the defendant's total default relieved the plaintiff of the obligation to pursue further administrative steps, and permitted the plaintiff to invoke judicial remedies to vindicate his constitutional rights to due process." Id.

Although the plaintiffs assert broadly that counts two through four raise independent constitutional claims warranting an exception to the exhaustion requirement equivalent to the exception recognized in *LaCroix*, the facts of the present case bear little similarity to those

of *LaCroix*. *LaCroix* involved an instance where the court permitted a plaintiff to bring a collateral judicial action when he did not deliberately bypass the statutory appeal route but, instead, was constrained by the defendant board's failure to hold a timely hearing. In the present case, however, the plaintiffs were not constrained or limited by the defendants in any way, and could have availed themselves of the administrative appeal process available to them but deliberately chose not to. See General Statutes § 4-176.

The plaintiffs additionally rely on *McKinney* v. *Coventry*, supra, 176 Conn. 613, and *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 406, for the contention that the facts of the present case warrant an exception to the exhaustion requirement like the "collateral challenge" doctrine invoked in those cases, which involved constitutional challenges to tax statutes. The evident flaw with the plaintiffs' argument is the fact that they made as applied constitutional challenges and sought relief that could have been provided to them by the state board.

As we noted previously, in both *McKinney* and *Stepney Pond Estates, Ltd.*, our Supreme Court considered collateral challenges to the imposition of a tax on the basis of the plaintiffs' claims that the taxes in those cases were unconstitutional. In *Stepney Pond Estates, Ltd.*, the court determined, on the basis of the rationale set forth in *McKinney*, that the trial court did not lack jurisdiction to hear the claim because the plaintiff "challenge[d] the validity of the tax in the first instance," not that the tax "was improperly calculated." *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 420.

In the present case, however, the plaintiffs explicitly argued before the trial court that their claims were "as applied challenge[s] and [were] not challenging the legislation . . . ." Furthermore, they argued that the

law "permit[s] them to question [the commissioner's] interpretation and that is precisely what they are doing in this as applied challenge." Thus, the plaintiffs' arguments make clear that they were not facially challenging the constitutionality of § 10-264*l* (m) (2) in the first instance, but, rather, the constitutionality of the commissioner's interpretation and calculation of the tuition under § 10-264*l* (m) (2) as applied to them. Accordingly, their constitutional challenges would not have required the state board to strike down the statute as unconstitutional—a power the state board lacks. Instead, their challenges, when properly construed, simply would have permitted the state board to declare that the statute could not be applied to the plaintiffs under the particular circumstances of the present case, a power the state board most certainly could have exercised. The state board, to which the legislature has conferred the power to interpret statutes and regulations pursuant to § 4-176, was well positioned to provide the plaintiffs with the very relief that they sought in the trial court had they brought a petition for a declaratory ruling. See *Connecticut Mobile Home Assn., Inc.* v. *Jensen's, Inc.*, 178 Conn. 586, 588–89, 424 A.2d 285 (1979) (declaratory judgment action seeking determination that certain lease provisions violated state statute barred by exhaustion doctrine because plaintiff failed to seek declaratory ruling from real estate commission pursuant to § 4-176, which confers on state agencies power to interpret statutes and regulations). Moreover, our courts "continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy." (Internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 571.

The plaintiffs have not sufficiently shown how it would have been demonstrably futile to file a petition for a declaratory ruling with the state board. In fact,

our review of the record discloses that the process the plaintiffs had available to them would have given them the opportunity to challenge the commissioner's interpretation of the statute and ultimate award of tuition.[7] This process could have then corrected any of the purported errors with respect to the commissioner's interpretation of the statute or the approval of the tuition award, which would have remedied the constitutional concerns the plaintiffs alleged in their complaint. If the plaintiffs were not satisfied with the resolution of the petition, they could have subsequently brought a declaratory judgment action in the Superior Court. See General Statutes § 4-183.

The plaintiffs in this case did not avail themselves of the administrative process available to them before first filing an action in the Superior Court. Consequently, their failure to do so divested the court of subject matter jurisdiction over counts two, three, and four of their complaint.

II

The plaintiffs claim next that the court erred by dismissing count six, a civil theft claim against the Bridgeport defendants, for lack of subject matter jurisdiction for failing to exhaust their administrative remedies. We need not, however, reach this issue because we conclude that the court lacked subject matter jurisdiction over this claim for another reason, namely, because the claim is not ripe for adjudication.[8]

[7] We acknowledge that the parties argued before the trial court the issue of whether Feehan had taxpayer standing to bring an action. We agree with the trial court, that, even if we assumed that he did have taxpayer standing, he, like the plaintiff school boards, was required to exhaust the administrative remedy of filing a petition for a declaratory ruling with the state board.

[8] Although the ripeness issue was raised before the trial court, it never decided the issue. Our Supreme Court has stated that "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised *and decided* in the trial court. . . . This rule applies equally to alternate grounds for affirmance." (Emphasis added; internal quotation marks omitted) *Perez-Dickson* v. *Bridgeport*,

In count six of the plaintiffs' complaint, they alleged that the actions of the Bridgeport defendants will at some future point, constitute civil theft as set forth in General Statutes §§ 52-564 and 53a-119 (1), (2), (3), and (6).[9] In particular, the plaintiffs allege that the Bridgeport defendants (1) will embezzle insofar as they have overstated the tuition costs necessary to operate the magnet schools and have done so with the intent to deprive the plaintiff boards of operating funds by misappropriating interdistrict magnet school revenues to municipal operating costs that are unassociated with the operation of the magnet schools; (2) will commit larceny by false pretenses insofar as they are submitting a false pretense, token, or device in the form of a request to charge the plaintiff boards tuition that overstates the necessary operating costs of the magnet schools; (3) will commit larceny by false promise insofar as they are promising to serve the students of the plaintiff boards with $1,818,000 of tuition and only intend to serve those students with approximately $500,000 worth of tuition; and (4) will defraud a public community insofar as they have authorized, certified, attested, or filed a request to charge the plaintiff boards that they know to be false, and they are knowingly accepting the benefits resulting from the request to charge from a public community.

The Bridgeport defendants moved to dismiss count six on the basis that the court lacked subject matter jurisdiction because the plaintiffs failed to exhaust their

304 Conn. 483, 498–99, 43 A.3d 69 (2012). One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation. Id., 500 n.23; see *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466–67, 985 A.2d 328 (2010). Because ripeness implicates the court's subject matter jurisdiction; *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86, 952 A.2d 1 (2008); it is proper for us to consider it as an alternative ground for affirmance of the trial court's dismissal of count six.

[9] In the plaintiffs' memorandum of law in opposition to the defendants' motions to dismiss, they acknowledged that, as of the date they filed the complaint, they had made no tuition payments to the Bridgeport board.

administrative remedies and because the plaintiffs' claim was not ripe. The plaintiffs filed an opposition to the Bridgeport defendants' motion. In the court's memorandum of decision dated May 23, 2017, it concluded that "the issue of whether the plaintiffs' claims are ripe for review is immaterial as the court lack[ed] subject matter jurisdiction over the plaintiffs' claims because the plaintiffs . . . failed to exhaust their administrative remedies."

In their principal brief on appeal, the plaintiffs argued that they need not exhaust their administrative remedies prior to bringing the underlying claim because the state board does not have the authority to hear claims regarding theft or misappropriation of moneys. The Bridgeport defendants argued that the court was correct in dismissing count six on this ground. Although the parties argued the issue of ripeness before the trial court, there was little discussion of it in their appellate briefs. On May 17, 2019, following oral argument before this court, we issued an order notifying the parties that they were permitted to file a supplemental brief on the issue of whether the trial court lacked subject matter jurisdiction over count six because the statutory theft claim was not ripe. The plaintiffs, the Bridgeport defendants, and the state defendants each filed a supplemental brief by the May 31, 2019 deadline.

In the defendants' supplemental briefs, they argue that the plaintiffs' civil theft claim is not ripe because the record before this court unequivocally reflects that the Bridgeport defendants have not collected or received any tuition from the plaintiffs, and that no invoice for the tuition payments was even sent to the plaintiff boards at the time the Bridgeport defendants filed their motion to dismiss. They observe that the plaintiffs do not dispute that they have not made any of the payments at issue. They observe, as well, that no theft, civil or otherwise, can occur absent the loss of property. The plaintiffs argue, however, that the ripeness doctrine does not bar the action. They argue that

the plaintiffs sought injunctive relief to prevent the city from unlawfully misappropriating moneys under color of state law and that requiring the plaintiffs to wait until the Bridgeport defendants unlawfully are in receipt of the moneys would render moot any claim for injunctive relief.

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 111 Conn. App. 80, 82, 957 A.2d 536 (2008). "A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction." *Mayer* v. *Biafore*, *Florek & O'Neill*, 245 Conn. 88, 91, 713 A.2d 1267 (1998). "The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 531–32, 46 A.3d 102 (2012).

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber*, *Inc.* v. *Tager*, 288 Conn. 69, 86–87, 952 A.2d 1 (2008).

The plaintiffs argue that the ripeness doctrine does not bar their claim in count six because they sought injunctive relief to prevent the city from unlawfully misappropriating the tuition moneys under color of state law and that requiring them to wait until the Bridgeport defendants unlawfully are in receipt of the moneys

would render moot any claim for injunctive relief. This argument is not persuasive. First, as stated previously, the plaintiffs alleged in count six that the Bridgeport defendants committed civil theft in violation of §§ 52-564 and 53a-119 (1), (2), (3), and (6). Section 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner *treble his damages*." (Emphasis added.) We have held that "[s]tatutory theft under . . . § 52-564 is synonymous with larceny [as provided in] . . . § 53a-119." (Internal quotation marks omitted.) *News America Marketing In-Store, Inc.* v. *Marquis*, 86 Conn. App. 527, 544, 862 A.2d 837 (2004), aff'd, 276 Conn. 310, 885 A.2d 758 (2005). Pursuant to § 53a-119, "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

Although the plaintiffs attempt to obfuscate the issue by arguing that dismissing count six will render moot its claim for injunctive relief, we remind the plaintiffs that injunctive relief is not a remedy available to them under the statutory theft statute. See General Statutes § 52-564. Rather, a party aggrieved under the statute is entitled to treble damages. General Statutes § 52-564. In the present case, the record makes clear that no payment for the tuition has in fact been paid out by the plaintiff boards to the Bridgeport defendants. Additionally, as the Bridgeport defendants note in their supplemental brief, no invoice for tuition had even been sent to the plaintiff boards at the time they filed their motion to dismiss. Thus, it is apparent that the plaintiffs have not suffered an injury sufficient to give rise to the cause of action alleged. In particular, the plaintiffs failed to allege that the Bridgeport defendants intentionally deprived them of their property. See *Mystic Color Lab, Inc.* v. *Auctions Worldwide, LLC*, 284 Conn. 408, 418–

19, 934 A.2d 227 (2007) ("[s]tatutory theft . . . requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property"); see also *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 771–72, 905 A.2d 623 (2006) ("[M]oney can be the subject of statutory theft. . . . The plaintiffs must establish, however, legal ownership or right to possession of specifically identifiable moneys." [Citation omitted.]). We also note that it would be impossible for a court to treble the plaintiffs' damages when no damages have been incurred in the first place. On the basis of the foregoing, we have little difficulty concluding that count six was not ripe for review and, thus, the trial court lacked subject matter jurisdiction over it. Accordingly, we conclude, albeit on a different jurisdictional ground than that on which the court relied, that the court properly dismissed count six of the plaintiffs' complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

SACK PROPERTIES, LLC *v.* MARTEL REAL ESTATE, LLC, ET AL.
(AC 41499)

Prescott, Elgo and Bishop, Js.

Syllabus

The plaintiff, the owner of lots 1 and 3 located in a three lot commercial subdivision, brought this action for, inter alia, quiet title and a declaratory judgment related to a drainage easement over lot 2 in the subdivision, which was owned by the defendant M Co. In 1978, the owner of the subdivision, B, had filed a revised map of the subdivision showing a drainage right-of-way, which commenced on the easterly line of lot 3, then down the southerly line of lot 1 and northerly line of lot 2, until it ran in its entirety down the northeast corner of lot 2. The stormwater runoff passed under the easement area through a subsurface concrete pipe. In 1984, B conveyed all three lots to I Co., which, in 2003, conveyed

lot 2 back to B and conveyed lots 1 and 3 to the plaintiff. The deed conveying lot 2 to B provided that the premises were subject to a drainage right-of-way along the northerly line of lot 2 but did not state who enjoyed that right-of-way. The deed conveying lots 1 and 3 to the plaintiff provided that they were conveyed together with a drainage easement across lots 1 and 2. Both deeds provided that the property was transferred with the appurtenances thereof. In 2007, B conveyed lot 2 to M Co., and that deed provided that only lot 1 enjoyed the right-of-way along lot 2. In 2013, M Co. connected to the pipe to provide additional drainage to its property. Following a trial to the court, the trial court rendered judgment in part in favor of M Co. on the plaintiff's claims for quiet title and trespass, and on its claim that M Co. overburdened its right to use the drainage easement. On the plaintiff's appeal to this court, *held:*

1. The plaintiff could not prevail in its claim that the trial court improperly rejected its quiet title and trespass claims and found that the plaintiff failed to prove that it exclusively owned the pipe through which its drainage ran: although the plaintiff claimed that it introduced evidence of ownership through the deeds and that the court neglected to consider that claim, it could not reasonably be disputed that the court carefully considered the evidence on which the plaintiff based its claim and rejected it, as the deeds relied on by the plaintiff were admitted into evidence, transcripts of the trial revealed extensive testimony and argument relating to the language of the deeds, the court instructed the parties to file posttrial briefs addressing the deeds and their significance to the plaintiff's claims, the court allowed the parties to argue their positions to the court and during argument the court discussed with counsel its concerns with and understanding of the evidence before it, and, therefore, the court's statement that the plaintiff presented "no evidence" of exclusive ownership constituted a determination that it was not persuaded by the plaintiff's evidence, not an erroneous finding that the plaintiff had not presented any evidence at all; moreover, the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe through which its easement runs was not clearly erroneous, as the plaintiff claimed exclusive ownership of the pipe on the basis of the deeds relating to the properties, which did not contain any reference to the pipe at issue, and although it was clear from the language of the deed conveying lots 1 and 3 to the plaintiff that the drainage easement over lot 2 was an appurtenance of lots 1 and 3, the plaintiff did not introduce evidence that the pipe itself, particularly that portion underneath lot 2, was an appurtenance to lots 1 and 3, as the language in the pertinent deeds referring to appurtenances pertained to appurtenances on the lot being conveyed, not appurtenances on the land over which the dominant estate enjoyed its easement and, thus, while the portion of the pipe that went through lot 1 may be considered an appurtenance to lot 1, the plaintiff cited no legal authority supporting its claim that

a certain habendum clause of the deed by which it obtained title to lot 1 also conveyed to it exclusive ownership of the portion of the pipe that went through lot 2.

2. The trial court's finding that the plaintiff failed to prove that M Co.'s use of the pipe to drain excess stormwater overburdened the drainage system was not clearly erroneous; in resolving this claim, the court credited the testimony of M Co.'s expert over that of the plaintiff's expert, and that credibility determination was within the exclusive province of the trial court to make.

Argued March 11—officially released July 23, 2019

Procedural History

Action seeking, inter alia, to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Moukawsher, J.*; judgment in part for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, with whom, on the brief, was *John M. Wolfson*, for the appellant (plaintiff).

Edward W. Gasser, with whom, on the brief, was *Margot E. Vanriel*, for the appellee (named defendant).

Opinion

BISHOP, J. In this action involving three lots of commercial property and a drainage easement enjoyed by the plaintiff, Sack Properties, LLC, the owner of two of those lots, over the lot owned by the defendant Martel Real Estate, LLC,[1] the plaintiff challenges the judgment of the trial court, rendered after a court trial, in part in favor of the defendant.[2] On appeal, the plaintiff claims that the trial court improperly (1) rejected its quiet title

[1] Thomaston Savings Bank, The U.S. Small Business Administration and Martel Transportation, LLC, are also defendants in this action. Because they have not participated in this appeal, any reference herein to the defendant is to Martel Real Estate, LLC.

[2] The plaintiff owns lots 1 and 3 of the property at issue. The court found in favor of the plaintiff on its claim that lot 3, in addition to lot 1, also enjoyed a drainage easement over the defendant's lot. The defendant has not challenged that determination.

and trespass claims on the ground that it failed to prove that it exclusively owned the pipe through which its drainage easement ran, and (2) found that it failed to prove that the defendant had overburdened its right to use the drainage easement. We disagree, and, accordingly, affirm the judgment of the trial court.[3]

The following relevant facts are undisputed. In 1976, the Town Planning Commission of Canton approved a three lot subdivision plan titled, "Powder Mill Industrial Park," submitted by the then-owner of the property, Henry Bahre. In 1978, Bahre filed a revised map of the subdivision, as required by the town, showing a drainage right-of-way, which commenced on the easterly line of lot 3, then down the southerly line of lot 1 and northerly line of lot 2, until it ran in its entirety down the northeast corner of lot 2, and went under Powder Mill Road, before it dumped into the Farmington River. The stormwater runoff passes under the easement area by way of a 24 inch subsurface concrete pipe.

In 1984, Bahre conveyed all three lots to Inertia Dynamics, Inc. The deed conveying lot 1 provided, inter alia: "Said premises are subject to a twenty (20') foot drainage right-of-way along the southeasterly boundary of the lot . . ." The deed conveying lots 2 and 3 provided, inter alia: "Lot No. 2 is subject to a drainage right-of-way along the northerly line of [l]ot No. 2."

Subsequently, on April 30, 2003, Inertia Dynamics, Inc. conveyed lot 2 back to Bahre. The deed conveying lot 2 to Bahre provided that the "premises are subject to a drainage right-of-way along the northerly line of [l]ot No. 2." It did not state who enjoyed that right-of-way. On the same day, Inertia Dynamics, Inc., conveyed lots 1 and 3 to the plaintiff. The deed conveying lots 1

[3] The court also found in favor of the defendant on the plaintiff's claims of nuisance, unjust enrichment and quantum meruit. The plaintiff has not challenged the court's judgment on those claims.

and 3 to the plaintiff provided that they were "conveyed together with a drainage easement across [l]ots 1 and 2 . . . ." Both of the 2003 deeds provided that the property was being transferred "with the appurtenances thereof . . . ." The deed conveying lot 2 to Bahre was recorded on the land records before the deed conveying lots 1 and 3 to the plaintiff.

In 2005, the plaintiff, at its sole expense, installed and/or made improvements to the subsurface drainage structures within the drainage easement area to service its drainage needs.

On April 13, 2007, Bahre conveyed lot 2 to the defendant. This deed also referenced the drainage right-of-way, but provided that only lot 1 enjoyed that right-of-way along the northerly line of lot 2. In 2013, the defendant, in developing its property, connected to the 24 inch pipe to provide additional drainage from its property.

The plaintiff filed this action by way of a seven count complaint, alleging a quiet title action pursuant to General Statutes § 47-31, an action for declaratory judgment pursuant to General Statutes § 52-29, interference with its easement, trespass, nuisance, unjust enrichment, and quantum meruit. The crux of the plaintiff's claims is that it exclusively owns both the right to enjoy the drainage easement—over lot 2, from both lots 1 and 3—and the 24 inch concrete pipe that services that easement, and that the defendant's connection to that pipe has overburdened the drainage system to the plaintiff's detriment.

Following a court trial, the trial court issued a memorandum of decision dated March 8, 2018, finding in the plaintiff's favor that it enjoyed the drainage easement not only from lot 1, which was not disputed by the defendant, but also from lot 3. In ruling on the plaintiff's additional claims, the court reasoned: "[The plaintiff]

has [not] proved it owned the pipe. The pipe was there when [the plaintiff] bought lot 1. The water was flowing through it. But [the plaintiff] did [not] prove who built the pipe or prove that its entire length was conveyed to [the plaintiff] when it bought lot 1. Remember, this was one lot and it [is] possible the developer intended the pipe on lot 2 to be owned by the lot 2 owner with a right to use it by the lot 1 owner. Indeed, the evidence shows that the pipe had the stub of a pipe attached to it pointed in the direction of the rest of lot 2. It sits in a way that implies it was there for lot 2 to connect with. In fact, while [the defendant] replaced the pipe stub with a new pipe, [it] connected to the concrete drainage pipe at the very spot where the concrete stub had been installed. There is no evidence showing [that the plaintiff] exclusively owns the pipe. Therefore, [the plaintiff] has not met its burden to prove ownership and trespass."

The court also rejected the plaintiff's claim that the defendant interfered with its easement. The court reasoned: "[The plaintiff] has [not] proved its right to drain is impaired—that its easement over lot 2 is surcharged by excessive drainage into the pipe. [The defendant's] lot 2 drainage system only uses the pipe as an overflow system. Its main system is two infiltration basins—sand pits encircled by a permanent stone barrier. At one side of the property this is fed by an elongated swale or trench. In both locations the basins have a raised concrete outlet structure with a grate across the top of it. In particularly heavy rains water would flow into the grate and openings on the elevations of the structure. The credible testimony of Kevin Clark, the engineer who designed it, shows that the pipe might get some use in a two year storm—a storm that has a 25 [percent] chance of happening in any given year. But the pipe most likely would [not] get any use in a typical rain storm of an inch or less. This discredits the testimony

and calculations of [the plaintiff]'s expert, James Cassidy. [Cassidy's calculations] depended on both lots 1 and 3 draining into the pipe when lot 3 does [not] yet and may never drain into it, and they also depend on lot 3 being developed to virtually the maximum extent possible with 50 [percent] of the lot being covered with an impervious material that would dramatically increase the amount of drainage from lot 3 and into the pipe. Since even [the plaintiff]'s wrong-headed and hypothetical assumptions showed the pipe barely over capacity, there can be little doubt that Clark's more credible assumptions show a minimal impact on the pipe capacity.

"This minimal impact means the system likely has little effect on [the plaintiff]'s anti-pollution device. This is especially the case in light of Martel's testimony that any water that reached it would be part of a lot 2 system that includes a 1500 gallon oil and water separator that removes many pollutants long before the water even reaches [the plaintiff]'s anti-pollution device.

"[The plaintiff] has [not] proved that connecting the lot 2 system to the pipe has had or will have any negative effect on its pollution control device or that it surcharges [the plaintiff]'s drainage easement."

The court, therefore, found in favor of the defendant on the remainder of the plaintiff's claims. This appeal followed.

This court has held that "[w]hether a disputed parcel of land [or a portion of that land] should be included in one or another chain of title is a question of fact for the court to decide." *Porter* v. *Morrill*, 108 Conn. App. 652, 663, 949 A.2d 526, cert. denied, 289 Conn. 921, 958 A.2d 152 (2008). Similarly, the determination of whether one has interfered with the use of an easement is a question of fact. *Kelly* v. *Ivler*, 187 Conn. 31, 49, 450 A.2d 817 (1982). "The trial court's findings are binding

upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co. v. Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018). With these principles in mind, we address the plaintiff's claims on appeal in turn.

I

The plaintiff first claims that the trial court improperly rejected its quiet title and trespass claims on the ground that it failed to prove that it exclusively owns the 24 inch pipe through which its drainage easement runs under lot 2. The plaintiff argues that the trial court erroneously found that there was "no evidence" of exclusive ownership and that it failed to prove exclusive ownership. We are not persuaded.

We first address the plaintiff's claim that the trial court erroneously found that "[t]here is no evidence showing [the plaintiff] exclusively owns the pipe." The plaintiff contends that it did, in fact, introduce evidence of ownership, specifically, the deeds, and, therefore, that the trial court's statement that there was "no evidence" was erroneous and that the court erred in failing to consider the evidence before it. In support of this argument, the plaintiff cites to our Supreme Court's recent decision in *In re Jacob W.*, 330 Conn. 744, 200 A.3d 1091 (2019). Our Supreme Court explained, in that termination of parental rights case, that "[t]he trial court . . . did not provide any analysis as to the second prong of [General Statutes] § 45a-717 (g) (2) (C). Instead, the court grounded its decision on the conclusory finding that '[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental [to their best interests].' That finding cannot be reconciled with the record, which reveals that there *was* evidence presented that was relevant to this question. . . .

"In arriving at its finding that the petitioner had presented no evidence that it would be detrimental to allow the respondent more time to develop or reestablish a relationship with the children, the trial court did not accord any effect to evidence that had been presented at trial that was relevant to that precise question." (Emphasis in original.) Id., 770–71.

Our Supreme Court construed the trial court's finding of "no evidence" as "expressly declining to consider . . . relevant evidence." Id., 771–72. Our Supreme Court concluded: "In light of the abundance of evidence in the record contrary to the trial court's statement that there was *no evidence* presented that it would be detrimental to the best interests of the children to allow

additional time for the respondent to develop a relationship with them, we are left with a firm conviction that a mistake has been made and, therefore, conclude that the trial court's finding was clearly erroneous." Id., 774.

Unlike in *In re Jacob W.*, our review of the record in the present case does not leave us with a firm conviction that a mistake has been made. The plaintiff's argument that, "[b]ecause the trial court did not address the plain language of the deeds in its final, written analysis of the plaintiff's argument in this case, it is impossible to know whether the trial court considered and rejected the plaintiff's argument in reaching its final decision or whether the trial court simply neglected to consider the argument" is belied by the record before us. It cannot reasonably be disputed, given the entirety of the trial court record in this case, that the trial court carefully considered the evidence on which the plaintiff based its claim of ownership of the pipe and rejected it. All of the deeds relied on by the plaintiff in support of its claim of exclusive ownership of the pipe were admitted into evidence, and the transcripts of the trial reveal extensive testimony and argument relating to the language of the deeds. Not only was there extensive discussion and argument regarding the deeds among counsel and the court, but the court instructed the parties to file posttrial briefs specifically addressing the deeds and their significance to the plaintiff's claims.[4] Following the filing of these briefs, the trial court allowed the parties to argue their respective positions to the court. During that argument, the court discussed with counsel for both parties, its concerns with and understanding of the evidence before it. On the basis of our review of the record, which is replete with discourse between the court and the parties relating to the plaintiff's claims

[4] Specifically, the trial court ordered posttrial briefs seeking "law on what appurtenances include, law on the sequence of conveyances . . . and law on the sequence of recording on the land records . . . ."

and the evidence that it had introduced in support of those claims, the plaintiff's argument that the court either neglected or forgot about its claim regarding the deeds is untenable. Moreover, "it is inevitable that the court considered other evidence not expressly identified in its decision. Rather, we presume that the trier considered *all* of the evidence in making its findings, and we review them only for clear error." *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 384, 112 A.3d 1 (2015). We thus conclude that the court's statement that the plaintiff presented "no evidence" of exclusive ownership constituted a determination that it was not persuaded by the plaintiff's evidence, not an erroneous finding that the plaintiff had not presented any evidence at all.

We also cannot conclude that the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe through which its easement runs was clearly erroneous. "It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . ." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 700, 923 A.2d 737 (2007).

Although it is undisputed that the plaintiff enjoys a drainage easement over lot 2, and the right to use the pipe that lies beneath its own lot and lot 2 to effectuate that drainage, it also claimed exclusive ownership of the entire pipe, as it stretches from lot 2 to lot 1, then back across lot 2, and under Powder Mill Road, until it empties into the Farmington River. The plaintiff bases

its claim of exclusive ownership of the pipe on the deeds relating to the subject properties, particularly, the deed by which it acquired lots 1 and 3 from Inertia Dynamics, Inc. It is undisputed that neither that deed, nor any of the other deeds pertaining to the properties in this case, contain any reference to the pipe at issue. The sole language on which the plaintiff relies in support of its claim of exclusive ownership of the pipe is the habendum clause contained in the deed that provided that the lots 1 and 3 were transferred to the plaintiff with the "appurtenances thereof . . . ."[5]

"In considering what passes by a deed, appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. . . . The term 'appurtenance' passes nothing but the land and such things as belong thereto and are a part of the realty. . . . It is conveyed with the principal property. . . . Thus, an appurtenance is a right or privilege incidental to the property conveyed. . . . Appurtenances that pass are not limited to such as are absolutely necessary to the enjoyment of the property conveyed . . . but include such as are necessary to the full enjoyment thereof . . . and, a deed of property with 'appurtenances' conveys only what is appurtenant at the time of the conveyance." (Footnotes omitted.) 26A C.J.S., Deeds § 285.

[5] The plaintiff also argues that the lack of a similar habendum clause in the deed conveying lot 2 to the defendant reflects an intent by Bahre that the owner of lots 1 and 3 would be the exclusive owner of the entire pipe. Although the deed by which Bahre conveyed lot 2 to the defendant was the only pertinent deed lacking a habendum clause, we disagree with the plaintiff that the absence of such language is conclusive proof of an intent by Bahre that the owner of lots 1 and 3 exclusively own the pipe. Because appurtenances regularly run with land as it is conveyed, regardless of the presence or lack of a habendum clause, and because the deeds were drafted by different lawyers and at different times, the trial court reasonably could have declined to afford any weight to the lack of a habendum clause in the deed by which the defendant obtained title to lot 2.

In *Algonquin Gas Transmission Co.* v. *Zoning Board of Appeals*, 162 Conn. 50, 291 A.2d 204 (1971), our Supreme Court explained: "An appurtenance is . . . an apt term for detached apparatus which is built as an adjunct to a structure, to further its convenient use." (Citation omitted.) Id., 57–58. Examples of appurtenances include "a right of way or other easement to land; an outhouse, barn, garden, or orchard, to a house or messuage." *Black's Law Dictionary* (6th Ed., 1990). "Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Appurtenant is substantially the same in meaning as accessory, but it is more technically used in relation to property, and is the more appropriate word for a conveyance." *Black's Law Dictionary* (3rd Ed., 1933).

Here, although it is clear from the language of the deed conveying lots 1 and 3 to the plaintiff that the drainage easement over lot 2 is an appurtenance of lots 1 and 3, the plaintiff did not introduce any evidence that the pipe itself, particularly that portion of the pipe that lies beneath the surface of lot 2, is an appurtenance to lots 1 and 3. As the defendant aptly pointed out in argument before this court, the language in the pertinent deeds referring to appurtenances pertains to appurtenances on the lot that is being conveyed, not appurtenances on the land over which the dominant estate enjoys its easement. Thus, while the portion of the pipe that goes through lot 1 may be considered an appurtenance to lot 1, the plaintiff has cited to no legal authority, nor are we aware of any, that supports its claim that the habendum clause of the deed by which it obtained title to lot 1 also conveyed to it exclusive ownership of the portion of the pipe that goes through lot 2. To the contrary, the Appellate Court of Illinois has held that when real property is conveyed by deed, only those "buildings and appurtenances located

thereon are likewise conveyed." (Emphasis added.) *McPeak v. Thorell*, 148 Ill.App.3d 430, 434, 101 Ill.Dec. 730, 499 N.E.2d 97 (1986). In other words, *McPeak* stands for the proposition that a sewer line is only an appurtenance to the property on which it is located.

The holding in *McPeak* underscores the evidentiary insufficiency of the plaintiff's claim of exclusive ownership of the pipe that runs beneath lot 2. Not only do the pertinent deeds in this case not reference the pipe, but the plaintiff did not introduce any evidence of the parties' intent at the time of the conveyance of lots 1 and 3 to convey exclusive ownership of the pipe to the plaintiff. The court was persuaded by other factors that weighed against the plaintiff's argument of exclusive ownership of the pipe, such as the existence of the stub of the pipe to which the defendant connected that pointed in the direction to lot 2. We thus conclude that the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe was not clearly erroneous.[6]

II

The plaintiff also claims that the trial court erroneously determined that the defendant did not interfere with its enjoyment of its easement over lot 2. The plaintiff claims that adding stormwater runoff from lot 2 to the pipe at issue overburdens the usable capacity of the pipe, to its detriment. In resolving this claim, the trial court credited the testimony of the defendant's expert over that of the plaintiff's expert. Because that credibility determination is within the exclusive province of the trial court, we cannot disturb it. See *State*

[6] Moreover, the defendant argued that, when Inertia Dynamics conveyed lot 2 back to Bahre, which occurred prior to Inertia conveying lots 1 and 3 to the plaintiff, the pipe on lot 2 went with that conveyance, and therefore could not have gone to the plaintiff with the subsequent conveyances of lots 1 and 3. In other words, Bahre acquired the pipe on lot 2 before the plaintiff acquired lots 1 and 3 and their appurtenances, so the pipe could not have been considered an appurtenance to lots 1 and 3 at the time of the conveyance to the plaintiff.

v. *Montana*, 179 Conn. App. 261, 265–66, 178 A.3d 1119, cert. denied, 328 Conn. 911, 178 A.3d 1042 (2018). Accordingly, we cannot conclude that the court's determination that the plaintiff failed to prove that the defendant's use of the pipe to drain excess stormwater overburdened the drainage system was erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ADRIAN K.*
(AC 42633)

Keller, Bright and Devlin, Js.

Syllabus

The respondent father, whose minor child, A, previously had been adjudicated neglected, appealed to this court from the judgment of the trial court denying his motion to dismiss an order of temporary custody and modifying the dispositive order from protective supervision with the respondent mother to commitment to the custody of the petitioner, the Commissioner of Children and Families. After the trial court had adjudicated A neglected, it had ordered placement of A with the mother with protective supervision. The petitioner thereafter placed a ninety-six hour hold on A and filed a motion for an order of temporary custody, which was granted ex parte. The court scheduled a preliminary hearing on the order for temporary custody, and the petitioner filed a motion to modify the dispositive order from protective supervision to commitment. The trial court sustained the order of temporary custody and denied the father's motion to dismiss, and the father appealed to this court. *Held:*

1. The respondent father could not prevail on his claim that the trial court improperly denied his motion to dismiss the order of temporary custody, which was based on his claim that the trial court's subject matter jurisdiction ended when protective supervision expired on December 6, 2018, and that the court's jurisdiction was not continued as a result of the petitioner's failure to file a timely motion to modify as required under the applicable rule of practice (§ 33a-6 [c]), which provides that a motion

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

to modify protective supervision shall be filed no later than the next business day before a preliminary hearing on an ex parte custody order: the father's claim that the trial court's subject matter jurisdiction was limited by § 33a-6 (c) was unavailing, as rules of practice do not and cannot create or circumscribe jurisdiction, and, thus, whether the timing requirement of § 33a-6 (c) is mandatory or directory and whether the motion to modify protective supervision was timely filed are irrelevant to the question of whether the trial court had subject matter jurisdiction to sustain the order of temporary custody; moreover, on the basis of the plain language of the relevant statute (§ 46b-129 [b]), which provides that a motion for an order of temporary custody may be granted subsequent to the filing of a neglect petition, as had occurred in the present case, the court had jurisdiction to enter an ex parte order of temporary custody, as the neglect petition was pending when the order of temporary custody was signed, and the fact that a new petition was not filed with the motion for order of temporary custody was irrelevant, and although § 46b-129 is silent as to whether an order of temporary custody modifies an order of protective supervision, given the purposes underlying § 46b-129 and the clear language of the statute (§ 46b-121 [b] [1]) that gives the petitioner authority to enter orders regarding the protection and proper care of a child, an order of temporary custody issued pursuant to § 46b-129 (b) necessarily suspends or interrupts a period of protective supervision, such that previously ordered protective supervision cannot expire and terminate the underlying neglect petition while the order of temporary custody is in place; accordingly, when the order of temporary custody was granted, it essentially modified the existing period of protective supervision by suspending it, and the order of temporary custody, which suspended the order of protective supervision, was ongoing at the time the motion to modify was filed, and, therefore, the court had subject matter jurisdiction over the order of temporary custody when the petitioner subsequently filed the motion to modify the disposition.

2. The respondent father could not prevail on his claim that the court's denial of his motion to dismiss violated his rights to substantive and procedural due process, which was based on his unpreserved claims that the court's interpretation of the applicable rule of practice (§ 33a-6 [c]) as directory rather than mandatory created jurisdiction, thereby leaving A in the petitioner's care in violation of his right to family integrity, and deprived him of timely notice, as he failed to demonstrate the existence of a constitutional violation pursuant to *State* v. *Golding* (213 Conn. 233): because the trial court, pursuant to statute (§ 46b-129 [b]), had ongoing jurisdiction to rule on the order of temporary custody even though neither a new neglect petition nor a motion to modify had been filed by December 6, 2018, and because Practice Book § 33a-6 (c) could not confer or circumscribe the court's jurisdiction, the father's substantive due process rights were not violated; moreover, the court did not deprive the father of his right to family integrity and timely notice because although he has a vital interest in directing the care and

custody of his biological child, the court's decision to allow the petitioner to file a motion to modify one day late did not deprive the father of procedural due process or create a substantial risk of erroneous deprivation of the private interest of the father, who had notice of the ex parte order of temporary custody in advance of the preliminary hearing, was represented by counsel and had an opportunity to be heard and to contest fully the order of temporary custody and motion to modify before the court sustained the order of temporary custody and modified disposition to commitment.

Argued May 29—officially released July 18, 2019**

Procedural History

Petition to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Middletown, Juvenile Matters, where the court, *Woods*, *J.*, adjudicated the child neglected and ordered protective supervision; thereafter, the court, *Sanchez-Figueroa*, *J.*, issued ex parte orders granting temporary custody of the child to the petitioner; subsequently, the petitioner filed a motion to open and modify the disposition; thereafter, the court, *Sanchez-Figueroa*, *J.*, sustained the orders of temporary custody and denied the respondent father's motion to dismiss, and the respondent father appealed to this court. *Affirmed.*

Karen Oliver Damboise, for the appellant (respondent father).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Christopher DeMatteo, for the minor child.

Opinion

BRIGHT, J. The respondent father, Luis K.,[1] appeals from the judgment of the trial court denying his motion

** July 18, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The father is referred to herein as the respondent. The mother, Kali D., although also a respondent in the underlying proceedings, did not appeal, and for convenience is referred to herein as the mother.

to dismiss an order of temporary custody and modifying the dispositive order from protective supervision with the mother to commitment to the custody of the petitioner, the Commissioner of Children and Families. The respondent claims that (1) the court improperly denied his motion to dismiss the order of temporary custody for lack of subject matter jurisdiction, and (2) the court's denial of his motion to dismiss violated his right to due process under the fourteenth amendment to the United States constitution. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant. On November 29, 2017, the petitioner filed a neglect petition on behalf of the infant minor child. An addendum to the petition stated that the mother had used poor judgment by leaving the child alone in a car with the respondent, who had physically abused the child in October, 2017, despite the "clear recommendation" of the Department of Children and Families (department) that the respondent be supervised at all times when he was with the child. The child was adjudicated neglected on March 6, 2018. The court, *Woods*, *J.*, ordered placement of the child with the mother with six months of protective supervision until September 6, 2018. Specific steps for the respondent and the mother were ordered. On April 10, 2018, the respondent was convicted of risk of injury to a child and assault in the third degree arising out of his physical abuse of the child in October, 2017. At the respondent's sentencing, the court issued a standing criminal protective order prohibiting the respondent from having any contact with the child until January 1, 2083. On August 2, 2018, the court, *Sanchez-Figueroa*, *J.*, granted the petitioner's motion to extend protective supervision of the child in the mother's custody until December 6, 2018. Following an in-court review on November 1, 2018, the court ordered that full custody was vested

with the mother and confirmed that the period of protective supervision would expire on December 6, 2018.

On November 26, 2018, the department received a new referral alleging that the mother was engaging in substance abuse and was allowing the respondent access to the child. After an investigation, the petitioner, pursuant to General Statutes § 17a-101g, placed a ninety-six hour hold on the child and removed him from the mother's custody. On November 29, 2018, the petitioner filed a motion for an order of temporary custody, which was granted ex parte that same day.[2] A preliminary hearing was scheduled for December 7, 2018. In light of the order of temporary custody, the petitioner, pursuant to Practice Book § 33a-6 (c),[3] should have filed a motion to modify protective supervision at least one business day prior to the preliminary hearing. The petitioner, however, did not file a motion

[2] The court also ordered specific steps, which required, inter alia, that the mother comply with the lifetime criminal protective order as it pertains to the respondent and the child.

[3] Practice Book § 33a-6 provides in relevant part: "(a) If the judicial authority finds, based upon the specific allegations of the petition and other verified affirmations of fact provided by the applicant, that there is reasonable cause to believe that: (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from his or her surroundings and (2) that as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety, the judicial authority shall, upon proper application at the time of filing of the petition or at any time subsequent thereto, either (A) issue an order to the respondents or other persons having responsibility for the care of the child or youth to appear at such time as the judicial authority may designate to determine whether the judicial authority should vest in some suitable agency or person the child's or youth's temporary care and custody pending disposition of the petition, or (B) issue an order ex parte vesting in some suitable agency or person the child's or youth's temporary care and custody.

"(b) A preliminary hearing on any ex parte custody order or order to appear issued by the judicial authority shall be held as soon as practicable but not later than ten days after the issuance of such order.

"(c) If the application is filed subsequent to the filing of the petition, a motion to amend the petition or to modify protective supervision shall be filed no later than the next business date before such preliminary hearing."

to open and modify the dispositional order of protective supervision to commitment until the morning of the hearing on December 7, 2018.

At the December 7, 2018 preliminary hearing, the respondent argued that protective supervision had expired on December 6, 2018, the motion to modify was filed one day late according to Practice Book § 33a-6 (c), and that "as of today, there is no underlying neglect petition that accompanies this order . . . of temporary custody . . . . Therefore, we would argue that the court does not have jurisdiction, as there is no underlying neglect petition and the department did not file any such motion to modify protective supervision, pursuant to this Practice Book section within the time period specified in that Practice Book section."

The court sustained the order of temporary custody without prejudice until further order of the court. The court allowed the respondent, who was represented by counsel, time to brief his jurisdictional argument. The respondent filed a motion to dismiss on December 21, 2018. Following a hearing, the court denied the motion to dismiss on January 17, 2019, reasoning that Practice Book § 33-6a (c) is directory and that the court had jurisdiction to act on the motion for an order of temporary custody. The court stated that the fact that the motion for an order of temporary custody was granted on November 29, 2018, further solidified the court's subject matter jurisdiction because the order of temporary custody was filed and signed while the existing neglect petition was still active, and the motion for an order of temporary custody served as a "tacit request to modify the disposition of the protective supervision." After a contested hearing, the court, on February 19, 2019, sustained the order of temporary custody and committed the child to the care and custody of the petitioner. The court found that the child would be in immediate physical danger from his surroundings if he

were returned to the care and custody of the mother or the respondent. The court noted that the respondent could not have custody of the child due to his incarceration, and that the mother had not reached a level of understanding to make sure the child was kept safe and away from the respondent when he is released from incarceration. This appeal followed.

I

The respondent claims that the court improperly denied his motion to dismiss. He contends that the court's subject matter jurisdiction ended when protective supervision expired on December 6, 2018, and that the only mechanism to continue the court's jurisdiction was for the petitioner to file a timely motion to modify. He argues that there was no pending controversy because the petitioner's motion to modify was filed untimely on the day of the preliminary hearing in contravention of what the respondent argues is a mandatory requirement of Practice Book § 33a-6 (c) to file such a motion one business day before the preliminary hearing.[4] We do not agree.

"[I]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . When reviewing an issue of subject matter jurisdiction on appeal, [w]e have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented

[4] The attorney for the minor child argued in his appellate brief that the court improperly denied the respondent's motion to dismiss because the expiration of protective supervision deprived the court of subject matter jurisdiction, and the ex parte order of temporary custody did not interrupt or toll the period of protective supervision. The attorney for the minor child adopted the brief of the petitioner as to the respondent's constitutional claim, which is addressed in part II of this opinion.

by the action before it . . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Citation omitted; internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 531–32, 46 A.3d 102 (2012).

The respondent's claim is premised, in part, on his argument that Practice Book § 33a-6 (c) acts as a limit on the court's subject matter jurisdiction. In particular, he argues that "[b]y [the petitioner] failing to file the motion [to modify protective supervision] within the mandatory time frame prescribed by . . . [§ 33a-6 (c)], the court lacked jurisdiction to continue to preside over the matter." The respondent's reliance on a Superior Court rule of practice is misplaced. The law is clear that rules of practice adopted by our courts do not and cannot create or circumscribe jurisdiction. General Statutes § 51-14 (a) explicitly provides that the rules adopted by the justices of the Supreme Court, the judges of the Appellate Court and the judges of the Superior Court "shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts." See also *State* v. *Reid*, 277 Conn. 764, 776 n.14, 894 A.2d 963 (2006); *State* v. *Carey*, 222 Conn. 299, 307, 610 A.2d 1147 (1992). Consequently, whether the timing requirement of § 33a-6 (c) is mandatory or directory and whether the motion to modify protective supervision was timely filed are irrelevant to the question of whether the court had subject matter jurisdiction to sustain the order of temporary custody.

The real crux of the respondent's argument is that because the court-ordered period of protective supervision ended on December 6, 2018, there was no longer a neglect petition pending in the court on December 7,

2018, when the court held its preliminary hearing on the order of temporary custody. According to the respondent, because the case involving the child ended on December 6, 2018, and no new neglect petition had been filed on behalf of the child, there was no statutory basis for the court to proceed with the hearing.

The petitioner argues that the respondent's claim is legally incorrect in that General Statutes § 46b-129 (b)[5] specifically provides that a motion for an order of temporary custody may be granted subsequent to a neglect petition, which is what occurred in this case. According to the petitioner, once the motion was granted, the court maintained continuing jurisdiction to conduct further hearings on it. The petitioner further argued in opposition to the respondent's motion to dismiss in the trial court that "an [order of temporary custody], by its nature, modifies a custodial order. It removes custody from the parent and vests it in the [petitioner] in this case. Therefore, the . . . custody of the child that was vested in the parent under protective supervision, has been modified. That protective supervision order itself

[5] Section 46b-129 (b) provides in relevant part: "If it appears from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, *or subsequent thereto*, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety, the court shall either (A) issue an order to the parents or other person having responsibility for the care of the child or youth to appear at such time as the court may designate to determine whether the court should vest the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency pending disposition of the petition, or (B) issue an order ex parte vesting the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency. A preliminary hearing on any ex parte custody order or order to appear issued by the court shall be held not later than ten days after the issuance of such order. . . ." (Emphasis added.)

has been modified. The custodial portion of that has been changed to vest that custody in the petitioner." The petitioner also relies on General Statutes § 46b-121 (b) (1), which provides, in relevant part, that "[i]n juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care . . . of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the [petitioner]." According to the petitioner, this statute gave the court authority to enter orders regarding the child, who was, at the time, in the petitioner's custody. We agree with the petitioner.

On the basis of the plain language of § 46b-129 (b), there is no question that the court had jurisdiction to enter the November 29, 2018 ex parte order of temporary custody and schedule a hearing on the order. Section 46b-129 (b) provides that an order of temporary custody may arise "from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, or *subsequent thereto* . . . ." (Emphasis added.) The language "or subsequent thereto" clearly indicates that the legislature envisioned situations wherein a child's circumstances may change subsequent to the filing of a neglect petition, thereby requiring the filing of a motion for an order of temporary custody. Therefore, the court may grant a motion for an order of temporary custody subsequent to the filing of a neglect petition. In the present case, the neglect petition was still pending when the order of temporary custody was signed on November 29, 2018, and the fact that a new neglect petition was not filed with the motion for an order of temporary custody is not relevant. In fact, before the trial court, the respondent conceded that, at the time it was issued, the November 29, 2018 order of temporary custody "was a valid order."

The key issue then becomes whether the order of protective supervision expired on December 6, 2018, thereby ending the pending neglect petition, or whether, in essence, it was modified by the trial court's issuance of the ex parte order of temporary custody on November 29, 2018. We note that § 46b-129 is silent as to whether an order of temporary custody in any way modifies an order of protective supervision. Nevertheless, logic, the purposes underlying § 46b-129, and the clear language of § 46b-121 (b) (1) lead us to conclude that an order of temporary custody issued pursuant to § 46b-129 (b) necessarily suspends or interrupts a period of protective supervision, such that a previously ordered period of protective supervision cannot expire and terminate the underlying neglect petition while the order of temporary custody is in place.

First, logically, protective supervision ceases to exist when an order of temporary custody issues. Protective supervision involves the petitioner supervising someone else's, typically a parent's, custody of the child. In this case, the mother's custody of the child was the subject of the petitioner's supervision. Once the petitioner took custody of the child pursuant to the ninety-six hour hold, the petitioner was no longer supervising the mother's custody, but had assumed temporary custody of the child pending further order of the court. Consequently, as a matter of fact, at that point in time, the disposition of protective supervision had been modified and interrupted.

Second, the respondent's position would lead to bizarre results at odds with protecting a child suffering from serious physical illness or serious physical injury or who is in immediate physical danger, which is the purpose of orders issued pursuant to § 46b-129 (b). For example, under the respondent's analysis, if the ninety-six hour hold had been invoked by the petitioner at 11:59 p.m. on December 6, 2018, the petitioner would

have been required to return the child to the mother at 12:01 a.m. on December 7, 2018, because the period of protective supervision would have ended. Thus, the petitioner would have been required to return the child to the same unsafe circumstance she had removed the child from just minutes before. We will not conclude that the legislature intended such an absurd result. See, e.g., *In re Corey E.*, 40 Conn. App. 366, 373–74, 671 A.2d 396 (1996) (rejecting interpretation of statute that would lead to "bizarre" result of forcing department to return child to parent whose neglect caused commitment); *In re Adrien C.*, 9 Conn. App. 506, 512, 519 A.2d 1241 (rejecting interpretation of statute that would lead to return of child to "what could be a hostile, unsafe and dangerous environment"), cert. denied, 203 Conn. 802, 522 A.2d 292 (1987).

In reaching this conclusion we find instructive the Superior Court case of *In the Interests of Felicia B.*, Superior Court, judicial district of Middletown, Docket Nos. FO4-CP-000291, FO4-CP-000292, FO4-CP-003125, FO4-CP-003126, FO4-CP-003373 (April 21, 1999) (Quinn, J.), which addressed the interplay of orders of protective supervision and orders of temporary custody on facts similar to those in the present case. In *Felicia B.*, five children were adjudicated neglected and, on August 5, 1998, placed with their mother under protective supervision, which was set to expire on March 5, 1999. Ex parte orders of temporary custody were then issued on September 18, 1998, and a hearing was scheduled for September 24, 1998. The hearing did not go forward on that date and eventually was scheduled to proceed on March 18, 1999. At that time, the respondent moved to dismiss the orders of temporary custody because the period of protective supervision ended on March 5, 1999, thereby depriving the court of subject matter jurisdiction. The court rejected the respondent's argument. It first noted that "[c]ustody of the [children] with [the

petitioner] is inherently contradictory to orders leaving the children with their mother under protective supervision. The [orders of temporary custody] must therefore either have terminated or suspended the earlier orders of protective supervision." Using tenets of statutory construction, the court interpreted the conflicting orders harmoniously and concluded that the orders of temporary custody suspended the orders of protective supervision. The court determined that "the date provided for the expiration of the orders of protective supervision, March 5, 1999, was merely a courtesy extended by the court to compute the six month period and not the controlling jurisdictional date." The court denied the respondent's motion to dismiss and concluded that the orders of temporary custody suspended the period of protective supervision such that there were still four and one half months remaining on the protective supervision orders, meaning that the court continued to have subject matter jurisdiction.

We agree with the trial court's approach in *Felicia B.*, to harmonize the conflicting orders. In the present case, the order of temporary custody, which placed the child temporarily in the custody of the petitioner, and the order of protective supervision, which placed the child in the custody of the mother, cannot coexist. Realistically, the petitioner's ninety-six hour hold on the child followed by the court's order of temporary custody, both of which occurred prior to the expiration of protective supervision, had the effect of removing the child from the care and custody of the mother. Accordingly, when the order of temporary custody was granted, it essentially modified the existing period of protective supervision by suspending it. The order of temporary custody, which suspended the order of protective supervision, was ongoing at the time the motion to modify was filed. Therefore, the court had subject matter jurisdiction over the order of temporary custody when the petitioner subsequently filed the motion to modify the disposition.

We further note that § 46b-121 (b) (1) provides in relevant part: "In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the [petitioner]. . . ." Even if we were to conclude, which we do not, that the protective supervision expired on December 6, 2018, and the underlying neglect petition had been terminated, the trial court nonetheless had the authority to issue an order of temporary custody pursuant to § 46b-121 (b) (1) to protect the child who was "otherwise . . . in the custody of the [petitioner]."

On the basis of the foregoing, we conclude that the trial court had jurisdiction over the order of temporary custody. Accordingly, the court properly denied the respondent's motion to dismiss.

II

The respondent next claims that his constitutional rights to (1) substantive and (2) procedural due process were violated by the court's denial of his motion to dismiss. We are not persuaded.

A

The respondent argues that the court's interpretation of Practice Book § 33a-6 (c) as being directory improperly created jurisdiction thereby leaving the minor child in the petitioner's care in violation of his constitutional right to family integrity.[6] We disagree.

The respondent concedes that this claim is unpreserved and seeks review under *State* v. *Golding*, 213

[6] The respondent's purported concern about his right to family integrity is somewhat curious given that he is prohibited from having any contact with the child until January 1, 2083.

Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail." (Emphasis omitted; footnote omitted.) Id.; see *In re Yasiel R.*, supra, 781, (modifying third prong of *Golding* by eliminating word "clearly").

The record is adequate for review, and the claim, which involves the custody and care of the respondent's biological child, is of constitutional magnitude. See *In re Zoey H.*, 183 Conn. App. 327, 348, 192 A.3d 522 ("[p]arents have a substantive right under the [d]ue [p]rocess [c]lause to remain together [with their children] without the coercive interference of the awesome power of the state" [internal quotation marks omitted]), cert. denied, 330 Conn. 906, 192 A.3d 425 (2018). Therefore, the claim is reviewable.

Regarding the third prong of *Golding*, we conclude, however, that the alleged constitutional violation does not exist. Interpreting Practice Book § 33a-6 (c) as directory does not expand the trial court's jurisdiction because, as we stated in part I of this opinion, the rules of practice cannot confer or circumscribe the court's jurisdiction. Under § 46b-129 (b), the trial court had ongoing jurisdiction to rule on the order of temporary custody even though neither a new neglect petition nor a motion to modify had been filed by December 6, 2018. Accordingly, the respondent's substantive due process rights were not violated.

B

The respondent next argues that by failing to interpret Practice Book § 33a-6 (c) as being mandatory, the court deprived him of his right to family integrity and timely notice. The respondent's claim meets the first two prongs of *Golding* for the same reasons as stated in part II A of this opinion and, therefore, is reviewable. The respondent's claim fails to satisfy the third prong of *Golding* because the alleged constitutional violation does not exist.

"The United States Supreme Court established a three-pronged balancing test in *Mathews* [v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)] to determine what safeguards the federal constitution requires to satisfy procedural due process. Courts apply that balancing test when the state seeks to terminate parental rights. . . . The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. [Id., 335.]" (Citations omitted.) *In Re Shaquanna M.*, 61 Conn. App. 592, 606, 767 A.2d 155 (2001).

Under the first factor, the respondent has a vital interest in directing the care and custody of his biological child. See *In re Baby Girl B.*, 224 Conn. 263, 279, 618 A.2d 1 (1992) ("the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection"). We are not persuaded, under the second factor, that the court's exercise of its discretion to permit the department to file a motion to modify one day late created a substantial risk of an erroneous deprivation of the respondent's private interest. The

respondent had notice of the ex parte order of temporary custody in advance of the preliminary hearing. He was represented by counsel and had an opportunity to be heard at the preliminary hearing. Furthermore, the respondent had an opportunity to contest fully the order of temporary custody and the motion to modify the disposition before the court sustained the order of temporary custody and modified disposition to commitment on February 19, 2019. Regarding the third factor, "the express public policy of this state [is] to provide all of its children a safe, stable nurturing environment." *State* v. *Anonymous*, 179 Conn. 155, 171, 425 A.2d 939 (1979).

In balancing the factors, we conclude that the court's decision to accept the petitioner's motion to modify, which had been filed one day later than the time set forth in our rules of practice, when the respondent had notice of the order of temporary custody over which the court had jurisdiction, and when the respondent was afforded an opportunity to contest fully the order of temporary custody, did not deprive him of his right to procedural due process. Accordingly, we conclude that the respondent has not demonstrated the existence of a constitutional violation.

The judgment is affirmed.

In this opinion the other judges concurred.

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Unfair trade practices; alleged violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); attorney's fees; claim that this court should recognize rebuttable presumption in context of attorney's fees for CUTPA violations, whereby prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such award unjust; whether trial court abused its discretion in declining to award plaintiff attorney's fees pursuant to statute (§ 42-110g [d]); claim that trial court erred by conflating analyses for awarding attorney's fees and punitive damages under CUTPA.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JOSHUA KOMISARJEVSKY, SC 18973
Judicial District of New Haven

Criminal; Murder; Whether Defendant Denied Fair Trial as a Result of Prejudicial Pretrial Publicity; Whether Defendant Denied a Fair Trial by State's Alleged Failure to Disclose Exculpatory Evidence. The defendant was convicted of capital felony, murder, arson, sexual assault and other crimes in connection with a 2007 home invasion and triple homicide in Cheshire. He appeals, claiming that he was denied his right to a fair trial before an impartial jury when the trial court denied his requests that the trial be moved from the judicial district of New Haven to the judicial district of Stamford-Norwalk. He argues that the extensive pretrial publicity surrounding the case aroused the passions of the community and prejudiced potential jurors against him and that this is an extreme case where prejudice should be presumed because the crime was so infamous and the adverse publicity so inflammatory that it was impossible to select an impartial jury in New Haven. He further argues that, even if prejudice is not presumed, he is entitled to a new trial because he can show that actual prejudice affected the jury. In addition, the defendant claims that the state violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), which requires that the prosecution disclose to the defense all evidence that might exonerate the defendant, by failing to disclose 132 pages of letters written by his codefendant, Steven Hayes, and six recordings of police communications from the date of the incident. He argues that the evidence would have supported his defense theories that he lacked the intent to kill the victims and that Cheshire police officers, due to their feelings of guilt and embarrassment regarding their inadequate response to the incident, were motivated to undermine the veracity of the exculpatory statements that the defendant made while in their custody. Among the defendant's other claims on appeal are that (1) the trial court abused its discretion in denying his challenges for cause of twelve jurors, (2) the trial court abused its discretion in denying his motions to open the evidence, for a continuance and for a mistrial in light of the state's untimely disclosure of Hayes' letters, and (3) he was denied his right to a fair trial when the state presented testimony and argument at trial that it knew or should have known was false or misleading.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* JEFFERY COVINGTON, SC 20198
Judicial District of New Haven

Criminal; Carrying a Pistol Without a Permit; Whether State Presented Sufficient Evidence that Defendant Possessed Firearm With a Barrel Less Than Twelve Inches in Length. The defendant was charged with murder, assault in the first degree, and carrying a pistol without a permit in connection with the shooting of brothers Travon and Taijhon Washington. Travon survived the shooting; Taijhon did not. While a jury was unable to reach a verdict with respect to the charges of murder and assault in the first degree, it found the defendant guilty of carrying a pistol without a permit in violation of General Statutes § 29-35. General Statutes § 29-27 defines "pistol," for purposes of § 29-35, as "any firearm having a barrel less than twelve inches in length." The defendant appealed to the Appellate Court, claiming that the evidence was insufficient to convict him of violating § 29-35 where the firearm used in the shooting was never recovered and where he claimed that the state failed to present sufficient evidence that the barrel of the firearm he allegedly used in the shooting was less than twelve inches in length. The Appellate Court (184 Conn. App. 332) rejected that claim and affirmed the defendant's conviction, finding that the circumstantial evidence presented at trial was sufficient to permit the jury to rationally infer that the barrel of the gun the defendant used in the shooting was less than twelve inches long. The court noted that a witness testified at trial that, following the shooting, the defendant was seen with what the witness described as a handgun and that the state's firearms examiner testified that the bullets recovered from Taijhon's body were consistent with bullets fired from a handgun or revolver, which is a type of handgun. The Appellate Court then looked to a dictionary definition of "handgun" as "any firearm that can be held and fired with one hand." The court then cited appellate precedent establishing that a finder of fact reasonably may infer that a handgun necessarily has a barrel of less than twelve inches in length. The Supreme Court granted the defendant's petition for certification to appeal, and it will decide whether the Appellate Court properly concluded that the state presented sufficient evidence for the jury to find the defendant guilty of carrying a pistol without a permit in violation of General Statutes § 29-35.

LIME ROCK PARK, LLC *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF SALISBURY, SC 20237/20238/20239

Judicial District of Litchfield

Zoning; Whether General Statutes § 14-164a Preempts Zoning Regulation of Days and Hours of Motor Vehicle Racing; Whether Plaintiff Waived Challenge to Regulation Prohibiting Sunday Racing. The plaintiff, Lime Rock Park, LLC, owns property in the town of Salisbury on which motor vehicle racing has taken place since 1957. In 2015, the town's planning and zoning commission (commission) adopted amendments to the zoning regulations limiting the days and hours of operation of the race track. The plaintiff appealed to the Superior Court, challenging the regulations that prohibit racing on Sundays, prohibit the racing of mufflered vehicles on Saturdays and limit the racing of unmufflered vehicles to ten Saturdays per year, plus three specified holidays. The Lime Rock Citizens Council, LLC (council), a group of individuals and entities who own property near the race track, was permitted to intervene as a defendant to the action. The trial court sustained the appeal as to the plaintiff's claim that the regulation prohibiting Sunday racing violated General Statutes § 14-164a, holding that the statute preempted the zoning regulations' restriction on Sunday racing and that a zoning commission is not authorized to regulate motor vehicle racing more strictly than it is regulated by § 14-164a. The statute provides that races "may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday" and that the "[t]he legislative body of the [municipality] in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any [municipal] ordinances." The trial court denied the appeal as to the remainder of the plaintiff's claims. The plaintiff, the council and the commission have all filed appeals challenging the trial court's judgment. The plaintiff argues that the trial court improperly rejected its claims that (1) the regulations restricting Saturday racing are also preempted by § 14-164a; (2) the commission was required to obtain approval from the department of energy and environmental protection before adopting regulations that place different restrictions on the racing of unmufflered and mufflered motor vehicles; and (3) the commission exceeded its authority by including in the regulations a requirement that an application to amend the new regulations concerning motor vehicle racing times include special permit and site plan applications. The council and the commission argue that the trial court wrongly determined that § 14-164a preempts the regulation prohibiting Sunday racing and wrongly determined that the commission is not

authorized by General Statutes § 8-13 to regulate motor vehicle racing more strictly than § 14-164a. The council also argues that the trial court improperly found that the plaintiff had not, through its predecessors in interest, waived its right to challenge the ban on Sunday racing by stipulating, in 1966 and 1988, to judgments that reaffirmed the ban and by failing to appeal and challenge previous iterations of the Sunday ban. The council claims that the plaintiff is now estopped from challenging the ban because it acquiesced in it for almost fifty years and because neighboring property owners acted in reasonable reliance on the assumption that there would be no racing at the track on Sundays.

GEORGE R. DICKERSON *v.* CITY OF STAMFORD et al., SC 20244
Compensation Review Board

Heart and Hypertension Benefits Under General Statutes § 7-433c; Whether Plaintiff who was Previously Awarded § 7-433c Benefits for Hypertension was Required to File a New Claim for Benefits for Subsequently Developing Coronary Artery Disease. General Statutes § 7-433c provides that members of municipal police or fire departments are eligible for benefits for death or disability caused by hypertension or heart disease, without needing to prove that the injury arose out of their employment. In 2000, the plaintiff was diagnosed with hypertension while he was employed as a member of the defendant city of Stamford's police department, and his claim for benefits under § 7-433c was accepted. In 2014, after the plaintiff had retired from the police department, he suffered a heart attack as a result of coronary artery disease and he sought additional benefits under § 7-433c. The plaintiff claimed that his coronary artery disease was a new manifestation of, or "flowed from," his hypertension, for which he had already filed a timely notice of claim, and accordingly that he did not need to file another claim for benefits for the new injury. The Workers' Compensation Commissioner rejected the plaintiff's argument and dismissed his claim for § 7-433c benefits for coronary artery disease as untimely because the claim had not been filed within one year of his coronary artery disease diagnosis as required by General Statutes § 31-294c. In reaching that conclusion, the commissioner relied on the Supreme Court's decision in *Holston* v. *New Haven Police Dept.*, 323 Conn. 607 (2016), in which the court held that hypertension and heart disease are to be treated as two separate diseases for purposes of § 7-433c. The plaintiff appealed to the Compensation Review Board, which disagreed with the commissioner's application of *Holston*, holding that, if the plaintiff's coronary artery disease was deemed a sequela, or subsequent manifestation, of his hypertension,

then he was not obligated to file a timely new claim in order to recover § 7-433c benefits for the coronary artery disease. The Compensation Review Board held that it was within the trial commissioner's discretion to decide whether the plaintiff's hypertension and his coronary artery disease constituted separate and distinct heart diseases, and it remanded the matter to the commissioner for a factual determination as to whether the plaintiff's coronary artery disease was compensable as a sequela of his hypertension or whether it constituted a distinct heart disease for which the plaintiff was obligated to file a timely new claim for § 7-433c benefits. The defendant city appeals, claiming that the board erred in finding that the plaintiff will be entitled to benefits for his coronary artery disease if it is determined that his coronary artery disease is a sequela of his hypertension. The defendant argues that *Holston* established that hypertension and heart disease are separate disease processes for purposes of § 7-433c and that other appellate precedent establishes that a plaintiff is not entitled to recover § 7-433c benefits for a condition or disability that arose after the plaintiff's retirement. The defendant also urges that, should the Compensation Review Board's ruling that the plaintiff is entitled to benefits for coronary artery disease if it is determined that that disease "flowed from" his hypertension be upheld, the Supreme Court should hold that the plaintiff can recover only if he shows that his hypertension was the "sole contributing factor" leading to his coronary artery disease.

ERICA LAFFERTY et al. *v.* ALEX EMRIC JONES et al., SC 20327
Judicial District of Waterbury

Torts; Free Speech; Sanctions; Whether Trial Court Erred in Ruling that Defendants Could not Pursue § 52-196a Motion to Dismiss that Claimed that Plaintiffs' Suit Targeted Defendants for Exercising Their Right to Free Speech. On December 14, 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown and used an assault rifle to kill twenty first grade students and six adults. The defendants, Alex Jones and his companies, broadcast a nationally syndicated show. On the show, Jones and his guests represented that the Sandy Hook shooting was a hoax perpetuated by the United States government and that the plaintiffs, the Sandy Hook victims' immediate family members and a first responder on the day of the shooting, were paid "crisis actors" working at the government's direction. Jones and his guests further asserted that no one had died during the incident and that the plaintiffs had fabricated the deaths of their children. The plaintiffs brought this action against Jones and his companies sounding in, among other things, invasion of privacy,

defamation, and intentional infliction of emotional distress, alleging that Jones, although knowing that the shooting was real, advanced the theory that it was a hoax in order to promote his show and sell various products to his audience. The plaintiffs also claim that the defendants' defamatory statements have injured their reputations and exposed them to harassment from members of the public. The defendants filed a "special motion to dismiss" pursuant to General Statutes § 52-196a. Section 52-196a is an "anti-SLAPP" statute that provides defendants with an expedited means of seeking dismissal of a lawsuit that targets them for exercising their rights to free speech. The trial court allowed limited discovery relevant to the defendants' special motion to dismiss. After various discovery requests, the plaintiffs claimed that they were being stonewalled by the defendants in the discovery process and they moved for a sanction precluding the defendants from pursuing the special motion to dismiss. An additional issue concerning the defendants' conduct arose when Jones, on his show, seemed to threaten the plaintiffs' attorney and accused him of planting illegal material in the discovery that the defendants had turned over. The trial court granted the plaintiffs' motion for sanctions, finding that the defendants had engaged in obfuscation and delay in the discovery process and that Jones, on his show, had engaged in what the court characterized as a twenty minute tirade of harassment and intimidation directed against one of the plaintiffs' attorneys and his law firm. The court found that Jones' conduct was unacceptable and sanctionable, and it ordered that the defendants were precluded from pursuing the special motion to dismiss and that the plaintiffs were entitled to an award of attorney's fees in connection with Jones' tirade. The Chief Justice subsequently granted the defendants certification to appeal the sanction order pursuant to General Statutes § 52-265a. The defendants claim that the trial court wrongly denied them their right to pursue their § 52-196a special motion to dismiss without providing them a meaningful opportunity to he heard and that Jones' comments concerning the plaintiffs' attorney constituted constitutionally protected free speech and did not constitute true threats or incitements of imminent lawless action against the attorney.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES

Notice Regarding Posting Dates for the Dockets and Assignments for the 2019-2020 Court Year

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 16, 2019; October 15, 2019; November 12, 2019; December 9, 2019; January 13, 2020; February 18, 2020; March 23, 2020; and April 27, 2020.

Carolyn C. Ziogas
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 5, 2019; October 7, 2019; November 12, 2019; January 2, 2020; February 3, 2020; March 2, 2020; April 6, 2020; and May 11, 2020.

Carolyn C. Ziogas
Chief Clerk

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered on the court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2019–2020 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 28, 2019
Second Term Docket	Posted to the website August 23, 2019
Third Term Docket	Posted to the website September 23, 2019
Fourth Term Docket	Posted to the website October 21, 2019
Fifth Term Docket	Posted to the website November 26, 2019
Sixth Term Docket	Posted to the website January 10, 2020
Seventh Term Docket	Posted to the website February 10, 2020
Eighth Term Docket	Posted to the website March 16, 2020
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 31, 2019
Second Term Assignment	Posted to the website September 16, 2019
Third Term Assignment	Posted to the website October 15, 2019
Fourth Term Assignment	Posted to the website November 8, 2019
Fifth Term Assignment	Posted to the website December 20, 2019
Sixth Term Assignment	Posted to the website January 31, 2020
Seventh Term Assignment	Posted to the website February 28, 2020
Eighth Term Assignment	Posted to the website April 6, 2020
Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 15, 2019
Second Term Docket	Posted to the website August 22, 2019
Third Term Docket	Posted to the website September 26, 2019
Fourth Term Docket	Posted to the website November 7, 2019
Fifth Term Docket	Posted to the website December 16, 2019
Sixth Term Docket	Posted to the website January 24, 2020
Seventh Term Docket	Posted to the website February 28, 2020
Eighth Term Docket	Posted to the website April 2, 2020
Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 14, 2019
Second Term Assignment	Posted to the website September 18, 2019
Third Term Assignment	Posted to the website October 24, 2019
Fourth Term Assignment	Posted to the website December 6, 2019
Fifth Term Assignment	Posted to the website January 15, 2020
Sixth Term Assignment	Posted to the website February 21, 2020
Seventh Term Assignment	Posted to the website March 26, 2020
Eighth Term Assignment	Posted to the website April 30, 2020

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on May 9, 2019, in Docket Number HHD-CV-19-610633-S David V. Chomick (juris# 428595) of Glastonbury, CT was found to have engaged in misconduct.

As to the First Count:

1. David V. Chomick is suspended from the practice of law for a period of 20 days, commencing on June 1, 2019.
2. Attorney Linda Hadley, Juris No. 302693, of Farmington, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

As to the Second Count:

1. David V. Chomick is suspended from the practice of law for a period of 25 days, commencing immediately upon the conclusion of the suspension imposed as to the First Count herein.
2. Attorney Linda Hadley, Juris No. 302693, of Farmington, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Marshall Berger
Judge